91-1892

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

PETER RUBEN,

Petitioner,

v.

HOME PORT RENTALS, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the finding by the District Court that it had personal jurisdiction of Peter Ruben thereby denying him due process of law?

2. Did the Court of Appeals err in affirming the refusal of the District Court to vacate the default judgment under Rule 60(b) Fed.R.Civ.P. entered against Peter Ruben and in not finding that its failure to do so was an abuse of discretion?

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OPINION BELOW

The opinion below is *Home Port Rentals, Incorporated v. Peter Ruben and the International Yachting Group, Incorporated, a Florida Corporation; Denny Allen, Roger Moore, Jim Edwards,* (4th Cir. 1992) 957 F.2d 126; rehearing denied March 23, 1992. (App. p. A-1)

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the Court of Appeals was issued on February 25, 1992. A Petition for Rehearing was denied on March 23, 1992. (App. p. A-18)

28 U.S.C. Section 1254(1) confers jurisdiction on this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution. Amendment V:

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS; DUE PROCESS; EMINENT DOMAIN.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 4(d) Fed.R.Civ.P.

(d) Summons and Complaint: Person to be Served. The summons and complaint shall be

served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

> (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Rule 4(e) Fed.R.Civ.P.

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances

and in the manner prescribed in the statute or rule.

Rule 54(c) Fed.R.Civ.P.

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

Rule 55(d) Fed.R.Civ.P.

In all cases a judgment by default is subject to the limitations of Rule 54(c).

Rule 60(b) Fed.R.Civ.P.

Mistakes; Inadvertence, Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of

a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Section 15-9-710 S.C. Code Ann.
(1976; 1991 Cum. Supp.)

§ 15-9-710. When service by publication may be had.

When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) the fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas, the master, or the probate judge of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, this court, judge, clerk, master, or judge of probate may grant an order that the service be made by the publication of the summons in any one or more of the following cases:

(1) when the defendant is a foreign corporation and has property within the State or the cause of action arose therein;

(2) when the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors or to avoid the service of a

summons or keeps himself concealed therein with like intent;

(3) when the defendant is a resident of this State and after a diligent search cannot be found;

(4) when the defendant is not a resident of this State but has property therein and the court has jurisdiction of the subject of the action;

(5) when the subject of the action is real or personal property in this State and the defendant has or claims a lien or interest, actual or contingent, therein or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein;

(6) when the defendant is a party to an adoption proceeding and is either a nonresident or a person upon whom service cannot be had within the State after due diligence;

(7) when the defendant is a party to a proceeding for the determination of parental rights and is either a nonresident or a person upon whom service cannot be had within the State after due diligence; and

(8) when the defendant is a party to an annulment proceeding or where the subject of the matter involves the custody of minor children, support of minor children or wife, separate maintenance, or a legal separation.

Section 35-1-1490 S.C. Code Ann. (1976)

§ 35-1-1490. Liability to buyers for illegal or fraudulent sales or offers.

Any person who:

(1) Offers or sells a security in violation of subsection (2) of § 35-1-170 of § 35-1-410 or § 35-1-810, or of any rule or order under § 35-1-50 which requires the affirmative approval of sales literature before it is used or of any condition imposed under § 35-1-950 or § 35-1-990; or

> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;
>
> Is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six per cent per year from the date of disposition.

STATEMENT OF THE CASE

In August 1986 Home Port Rentals, Inc. (Home Port), a South Carolina corporation, instituted a civil action, based upon diversity of citizenship, in the United States District Court for the District of South Carolina, (C.A. No. 2:86-2141-1) against The International Yachting Group, Inc. (International), a Florida corporation, Peter Ruben (Ruben), Denny Allen (Allen), Roger Moore and Jim Edwards as defendants.[1] All the defendants were citizens

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[1] These were the names of all the parties in the Court below both in the 1986 and 1988 actions. Only Home Port,

(Continued on following page)

of Florida. All the defendants were served by certified mail at the corporate address of International, 302 Lewis Lane, Dania, Florida 33004. (App. p. A-34) Allen was President of International and retained attorney F. Mikell Harper (Harper) of Beaufort, South Carolina, to defend all the defendants. (App. p. A-102; p. A-124) Harper timely filed a Motion to Dismiss and an Answer on behalf of the defendants, denying liability and asserting a counterclaim on behalf of International. The action and the counterclaim arose out of a contract franchise agreement between Home Port and International and an unpaid $90,000.00 promissory note in connection therewith.

On April 1, 1986 another company, Adventurent, Inc. (Adventurent) acquired all the assets of International and continued business out of the same office which International had formerly used. (App. p. A-133) International ceased all operations at the end of 1986. (App. p. A-133) In December 1986 Adventurent moved to Ft. Lauderdale, Florida and its address there was Suite 106, 5450 NW 33rd Avenue, Ft. Lauderdale, Florida 33309. (App. p. A-133-134) On April 10, 1987 Harper filed a First Amended Answer and Counterclaim.

A consent Order, prepared by counsel for Home Port, and consented to by Harper, and without input from the Court, contained four numbered "stipulations" which were submitted to the Court for approval. The first stipulation was a non-suit without prejudice; the second stipulation, was that the defendants agreed to submit to the jurisdiction of the Court to resolve disputes arising between the parties; the third stipulation was a waiver by the defendants of the statute of limitations defense arising from the business relationship of the parties; and the fourth stipulation designated Harper to accept service of

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(Continued from previous page)

Ruben and Allen were parties appearing in the Court of Appeals.

process on behalf of the defendants. Stipulation paragraphs 2, 3 and 4 each ended with the language "*provided that*[2], the plaintiff institutes such proceedings no later than 180 days from the date of this Order." Paragraphs 2, 3 and 4 in the decretal portions of the Order, approving the "stipulations" of counsel, each concluded with the language "*provided that*[3], such proceedings are instituted no later than 180 days from the date of this Order." Therefore, *six* times in the consent Order drawn by Home Port's attorney the reference was to "180 days from the date of this Order." There was no other reference in the consent Order to an onset date for computing the 180 days. The Honorable Falcon B. Hawkins, United States District Judge, signed and dated the Order on November 4, 1987. It was filed on November 13, 1987. (App. p. A-39)

On November 3, 1987, Harper wrote Allen addressed in care of International at the new address of Adventurent, Suite 106, 5450 NW 33rd Avenue, Ft. Lauderdale, Florida 33309, informing him that the action had been dismissed by the Court but that the plaintiff had the right to bring the suit again although Harper opined, "I do not expect that to happen. If it does, however, I will let you know and keep you posted on developments in this matter." (App. p. A-37) At the time this letter was sent, Allen was no longer with International and had moved from Florida to Texas. That letter was forwarded to Allen and he received it in Texas. The letter did not refer to the stipulations in the Order nor was a copy of the Order forwarded then or later by Harper to Allen. After receiving Harper's letter of November 3, 1987, Allen, in a telephone exchange, informed Ruben that the action had been dismissed. (App. p. A-134; p. A-125)

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[2] Emphasis in original Order prepared by Home Port's counsel.

[3] Emphasis in original Order prepared by Home Port's counsel.

There was no communication between Harper and Ruben at any time. Ruben did not authorize Harper to consent to the stipulations in the consent Order and did not know they were in the Order. (App. p. A-103; p. A-135) Neither did Allen. (App. p. A-126) Neither Ruben nor Allen ever designated or authorized Harper as agent to accept service of process for the defendants. (App. p. A-103; p. A-126)

On May 4, 1988, 182 days after the date of the consent Order (which provided no more than 180 days to institute proceedings), Home Port filed and served a second lawsuit, based upon diversity of citizenship, in the same Court (C.A. No. 2:88-1167-1) against the same defendants by filing the Complaint and serving the Summons and Complaint on Harper. (App. p. A-58) The allegations of the Complaint in the second lawsuit were the same as those in the first lawsuit. On May 25, 1988, Harper served a Notice of Motion and Motion to Dismiss, and an Answer and Counterclaim. The Motion to Dismiss and Answer and Counterclaim were the same as he had filed in the first lawsuit. On May 25, 1988, Harper wrote Allen at the same Florida address of Adventurent to which he had written Allen on November 3, 1987, Suite 106, 5450 NW 33rd Avenue, Ft. Lauderdale, Florida 33309. The letter stated that copies of the Complaint, Answer, Counterclaim, Notice of Motion and Memorandum which had been filed were enclosed. The letter stated, "Please call me immediately and give me your new address and phone number." (App. p. A-60) This letter was sent by certified mail. Prior correspondence from Harper to Allen was not sent by certified mail. Because Allen was no longer at that address, the certified mail envelope containing the letter and enclosures was returned to Harper undelivered. Harper never attempted to write or communicate with Ruben, who at that time was still residing at the same address in Florida. Ruben did not receive any notice of this second lawsuit. Ruben had no contact of any kind with Harper. (App. p. A-104)

On August 1, 1988, Harper filed a Motion for an Order permitting his withdrawal of appearance as counsel for the defendants. At the hearing on Harper's Motion to be relieved as counsel, on August 25, 1988, he stated to the Court that to his knowledge the defendants did not in fact know that the second lawsuit had been instituted.[4] (App. p. A-77) At the time Harper's Motion to be relieved as counsel was heard, Ruben still resided at the same address in Florida, 581 Lake Dasha Boulevard, Plantation, Florida. He could have been contacted there. He was not. (App. p. A-105)

From August 1986 through August 1988 Ruben resided at 581 Lake Dasha Boulevard, Plantation, Florida. His name and telephone number, (305) 472-8724, were listed in the Fort Lauderdale, Florida telephone directory. (App. p. A-105) In early September 1988 Ruben moved to Mill Valley, California and has continued to live at the same address there, 4 Stanton Way, Mill Valley, California 94941. (App. p. A-135) When Ruben moved from Florida to California, he gave a forwarding address in California to the United States Post Office in Florida. (App. p. A-105)

Under date of September 23, 1988, the Court issued a Rule to Show Cause "why the Court should not enter a default Order against each of the above indicated defendants granting the relief sought in the Complaint" and allow Harper to withdraw as counsel "due to non-cooperation and failure of each of the above indicated defendants to defend against the causes of action under the Complaint and prosecute the counterclaim," and why the counterclaim should not be stricken with prejudice and why the Court "should not award the plaintiff punitive damages as requested in the matter." (App. p. A-79) Certified mailings of this Rule to Show Cause by the

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[4] Harper confirmed this again in his Affidavit of January 16, 1991. (App. pp. A-138-139)

Court was sent to the defendants at the old address of International, 302 Lewis Lane, Dania, Florida. They were all returned to the Court unopened and undelivered. (App. p. A-82; p. A-87) Home Port's counsel also caused publication of the Rule to Show Cause in a newspaper in Broward County, Florida. At that time Ruben had moved to and was living in California. Allen was living in Texas. Ruben had no notice of the Rule to Show Cause. (App. p. A-104; p. A-135)

On October 31, 1988 a default Order was entered in which the Court ruled "that each of the above named defendants is in default and jointly and severally liable to the plaintiff for actual and punitive damages as requested in this matter." (App. p. A-87) The grounds for granting the default against the defendants was the alleged failure of the defendants to cooperate in discovery matters and to participate in prosecution of the defense. (App. p. A-86)

A hearing on damages was held by the Court on March 16, 1989. The remarks of counsel and the Home Port presentation of its damages claim was six minutes in duration. (App. pp. A-88-95) Based upon this hearing, the Court issued an Order dated March 16, 1989 and filed March 17, 1989 granting the plaintiff judgment against all defendants in the amount of $1,200,000.00 actual damages and $50,000.00 punitive damages plus interest. (App. p. A-99) Ruben had no notice of the March 1, 1989 hearing. (App. p. A-104)

The Complaint in the action by Home Port against the defendants contained three separate causes of action. (App. pp. A-42-51) The first cause of action sought actual damages for breach of contract and was against the defendant International only. It did not allege any claim for damages or request any relief against Ruben. The second cause of action was in common law fraud and sought actual and punitive damages against the defendant International. It also did not allege any claim for damages or request any relief against Ruben. The third

cause of action sought actual damages against all defendants for alleged securities violations (Section 35-1-1490 S.C. Code Ann.). The third cause of action was the only cause of action seeking any damages against Ruben and the other individual defendants.

The default Order entered October 31, 1988 held the defendants "jointly and severally liable to the plaintiff for actual and punitive damages as requested in this matter." (App. p. A-87) The Home Port Complaint did not allege or seek any punitive damages against Ruben. Nevertheless, the default Order entered October 31, 1988 held the defendant Ruben liable for punitive damages.

In the Order of March 16, 1989, which awarded Home Port damages, the Court found actual damages under the first cause of action (breach of contract) in the amount of $381,483.47. Under the allegations of the Complaint, this would be against the defendant International only. The Court found damages under the second cause of action (common law fraud) in the amount of $1,200,000.00 actual damages and $50,000.00 punitive damages. Under the allegations of the Complaint, this would be against the defendant International only. The Court found damages under the third cause of action (Securities Act violation) in the amount of $469,026.21, which consisted of the actual damages awarded under the first cause of action plus interest of $87,542.74. Under the allegations of the Complaint and the Rule to Show Cause, this would be against all defendants. In the March 16, 1989 Order awarding damages, the Court found: (App. p. A-99)

> The actual damages which plaintiff seeks to recover under the first and third causes of action appear to be out-of-pocket expenses which the plaintiff would have incurred absent the breach. Thus, if the Court is to award the benefit of plaintiff's bargain under the second cause of action, it cannot also compensate plaintiff for is [sic] out-of-pocket expenses.

The Court then ordered judgment against all of the defendants, including Ruben, in the amount of $1,200,000.00 actual damages and $50,000.00 punitive damages.

A copy of the judgment was mailed to Ruben addressed to the old office address of International in Florida, 302 Lewis Lane, Dania, Florida. The letter was misdelivered to the next door resident, who happened to know Ruben, and he forwarded the letter to Ruben in California. (App. p. A-104) Ruben received it on Saturday, April 1, 1989. (App. p. A-112; p. A-136) He contacted his San Francisco attorney, Paul A. Stewart (Stewart), within two days who, in turn, contacted a South Carolina attorney, Randall Chastain (Chastain), of Columbia, South Carolina, on April 10, 1989 who agreed to represent Ruben in moving to open up the default as to him. (App. p. A-119) A retainer was paid Chastain on May 8, 1989 by Ruben. (App. p. A-100)

Chastain did not file a Motion to Vacate the judgment on behalf of Ruben until March 13, 1990. (App. p. A-108) The Motion was denied by the Court in an Order dated July 17, 1990. (App. p. A-20) A Motion to Reconsider was filed by Chastain on August 15, 1990 which was denied in an Order dated April 25, 1991. (App. p. A-27) An appeal was taken to the United States Court of Appeals for the Fourth Circuit which Court affirmed the Trial Court in an opinion dated February 25, 1992. (App. p. A-1) A Petition for Rehearing in that Court was denied on March 23, 1992. (App. p. A-18)

ARGUMENT

SUMMARY OF ARGUMENT

On Saturday April 1, 1989, Ruben received at his home in Mill Valley, California, through the United States Mail, an envelope addressed to him at the address of a company in Dania, Florida which had not been operative

since December 1986. The letter was misdelivered in Florida to the next door neighbor who happened to have Ruben's California address and the envelope was forwarded to him. This envelope contained a copy of a default judgment that had been entered against Ruben in the United States District Court in South Carolina, on March 20, 1989 in the amount of $1,200,000.00 actual damages and $50,000.00 punitive damages. This was Ruben's first awareness that a civil action was pending against him. He retained California counsel two days later who in turn contacted an attorney in South Carolina who was retained on April 10, 1989 to set the judgment aside. What began as a bad dream became a horror nightmare for Ruben. He has been adjudicated by the United States District Court in South Carolina and the United States Court of Appeals for the Fourth Circuit as having brought this judgment upon himself. These two Courts have adjudicated that he is bound by stipulations entered into by a Beaufort, South Carolina attorney who: (1) designated himself as agent for service of process for Ruben; (2) agreed to waive the statute of limitations on behalf of Ruben; (3) agreed to consent to the jurisdiction of the South Carolina Court on behalf of Ruben; (a) without ever having contacted Ruben; (b) without having any authorization or permission from Ruben to so designate himself and to enter into such stipulations; (c) without having informed Ruben even after the event that he had done so; (d) who thereafter purports to accept service on behalf of Ruben in an action instituted in the United States District Court in South Carolina; (e) after the time had expired for institution of a new action under the earlier stipulation by the attorney; (f) who does not notify Ruben that the action has been instituted against him; (g) who enters an appearance on behalf of Ruben; (h) who, on his own motion, is relieved as counsel for Ruben; (i) after which a default judgment is entered against Ruben for damages; (j) in a greater amount than sought in the Complaint upon which the default judgment rests.

In response to Ruben's efforts to have the default vacated so that he may have his day in court, the Court of Appeals rewrites the facts to justify the abuse of discretion by the District Court in refusing to vacate the default judgment. All this has been labelled by the Court of Appeals as due process of law in this two hundred and sixteenth year of the Sovereignty and Independence of the United States of America.

QUESTION 1: BECAUSE THE DISTRICT COURT DID NOT HAVE PERSONAL JURISDICTION OF PETER RUBEN, THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST HIM.

A. Purported service on Harper was not service on Ruben because Harper had not been authorized nor designated by Ruben as his agent for service of process.

Rule 4(d)(1) of the Fed.R.Civ.P. authorizes service of a Summons and Complaint on an agent of a party only if the agent is "authorized by appointment or by law to receive service of process." Ruben did not authorize Harper to accept service of process on his behalf. Allen never purported to authorize Harper to accept service of process on behalf of Ruben. Once the District Court dismissed the first lawsuit, it lost any jurisdiction over Ruben. Therefore, the 1988 lawsuit could only be instituted as to Ruben by effective service of process on him. *Robertson v. Railroad Labor Board,* 268 U.S. 619 (1925); *Central Operating Co. v. Utility Workers of America,* 491 F.2d 245, 249 (4th Cir. 1974); *Jackson v. Hayakawa,* 682 F.2d 1344, 1347 (9th Cir. 1982).

Over ninety years ago, in *Stone v. Bank of Commerce,* 174 U.S. 412, 421 (1899), this Court said:

> The authority of an attorney commences with his retainer. He cannot, while acting generally as

> an attorney for an estate or a corporation, accept service of process which commences the action, without any authority so to do from his principal. This was directly decided in *Starr v. Hall,* 87 N.C. 381 and *Reed v. Reed,* 19 S.C. 548 (1883), so far as regards a personal defendant; but the same rule would follow in case of a corporation, unless authority to appear were specifically given.[5]

Stone v. Bank of Commerce was cited by the Court in *Schwarz v. Thomas,* 222 F.2d 305, 308 (D.D.C. 1955) which said:

> The rule is clear that it must appear that an agent who accepts service must be shown to have been authorized to bind his principal by the acceptance of process and, further, that the authority cannot be shown by the extrajudicial statements of the attorney. This is an elementary law of agency.

The text writers are in accord. Moore's Federal Practice (2nd Ed. 1987), Section 4.12 (Vol. 2, page 138), says:

> The phrase "an agent authorized by appointment to receive service of process" is intended to cover the situation where an individual actually appoints an agent for that purpose. Where actual appointment to accept service is not shown, the service is invalid.

Wright and Miller, Federal Practice and Procedure, Civil 2d (1987), Section 1097, (Vol. 4A, page 86) says:

> Consistently with this judicial construction of "appointment" the courts have held that claims by an agent of having authority to receive process or the fact that an agent actually accepts

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[5] *Reed v. Reed,* cited in *Stone,* confirms that history is sometimes repetitive. In *Reed* the South Carolina Supreme Court held that another Beaufort attorney was not the agent for service of process of a client.

> process is not enough to bind the defendant; there must be evidence that the defendant intended to confer such authority upon the agent.[6]

The record negates any inference that Harper informed Allen that he purported to designate himself as agent for service of process on behalf of Ruben or anyone else. There was never any communication with Ruben. Harper's letter to Allen of November 3, 1987 spoke in terms of finality:

> This dismissal is of the kind that McEachern does have the right to bring the suit again, but in all honesty, I do not expect that to happen. * * * I believe that there is no further action on my part. (App. p. 252)

Even under the language of the consent Order in which Harper self-designated and self-licensed himself as agent to accept service of process on behalf of Ruben, that self-granted designation and self-granted license expired by its own terms 180 days from the date of the Order. Harper's self-granted license as an agent had, by its own terms, expired before he purported to accept service.

Because there was no service of the Summons and Complaint upon Ruben the entire proceedings, including the entry of judgment, are void for lack of personal

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[6] The Federal authorities are in accord. See *Shultz v. Shultz*, 436 F.2d 635 (7th Cir. 1971); *Ransom v. Brennan*, 437 F.2d 513 (5th Cir. 1971); *Santos v. State Farm Fire and Casualty Co.*, 902 F.2d 1092 (2nd Cir. 1990); *United States v. Marple Community Record, Inc.*, 335 F.Supp. 95 (E.D.Pa. 1971); *United States v. Bosurgi*, 343 F.Supp. 815 (S.D.N.Y. 1972); *Gibbs v. Hawaiian Eugenia Corp.*, 581 F.Supp. 1269 (S.D.N.Y. 1984); *Michelson v. Merrill, Lynch, Pierce, Finner & Smith*, 619 F.Supp. 727 (S.D.N.Y. 1985); *Whisman v. Robbins*, 712 F.Supp. 632 (S.D. Ohio 1988); *In re: Four Seasons Securities Law Litig.*, 63 F.R.D. 115 (W.D.Okla. 1974); and *Davis-Wilson v. Hilton Hotels Corp.*, 106 F.R.D. 505 (E.D.La. 1985).

jurisdiction. *Waldon v. Craig's Heirs,* 39 U.S. 147 (14 Pet.) (1840); *Nations v. Johnson,* 65 U.S. 195 (24 How.) (1860) ("No man shall be condemned in his person or property without notice and an opportunity to make his defence."); and *Earle v. McVeigh,* 91 U.S. 503 (1875).

B. The purported service by publication of the Rule to Show Cause did not effectuate service of process.

Harper confirmed to the Court at the time he was seeking to be relieved as counsel that Ruben and the other defendants did not know that the 1988 lawsuit had been instituted.[7] (App. p. A-77) The Rule to Show Cause issued under date of September 23, 1988 related to the proposed declaration of default as to the defendants. It did not purport to serve the Summons and Complaint. Even so, as a purported notice giving procedure, it was flawed. Rule 4(e) Fed.R.Civ.P. requires that when service of a summons or notice is attempted on a non-resident defendant, service must be made in the manner prescribed by the law of the state in which the District Court is located. Thus, South Carolina law controlled the issue of service of the Rule to Show Cause by publication. Under South Carolina law, service by publication on a non-resident is governed by Section 15-9-710 of the S.C. Code Ann. (1976; 1991 Cum. Supp.). Under that statute service by publication on an *individual* non-resident is limited to *in rem* proceedings, annulment, adoptions, parental rights and child custody proceedings. Service of process on Ruben by publication was not allowed under South Carolina law.

Constitutional due process requirements mandate that notice by publication be reasonably calculated under all the circumstances to apprise the interested parties as

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[7] Harper confirmed this again in his Affidavit of January 16, 1991. (App. pp. A-138-139)

to the pendency of an action and afford them an opportunity to present their objections. Service by publication is not sufficient when a person's name and address is known, or is easily ascertainable, and their legally protected interests are directly affected by the proceeding in question. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Schroeder v. New York*, 371 U.S. 208 (1962); *Robinson v. Hanrahan*, 409 U.S. 38 (1972). Publication of a Rule to Show Cause in a Florida newspaper can hardly be calculated to give notice to a citizen then residing in the State of California.

C. The second lawsuit was not instituted within the jurisdictionally permitted 180 days.

Even under the unauthorized and impermissible consent Order executed by Harper, a second lawsuit could not be instituted by Home Port later than 180 days from the date of the consent Order. That Order is dated November 4, 1987. The second lawsuit was not instituted until May 4, 1988. This was 182 days after the date of the Order. The Court of Appeals endorsed the District Court's "interpreting its order in the manner that it did" by concluding that the District Court was free to "interpret" its Order as to what "the date of this Order," used six times, meant. Predestined interpretation[8] of its Order

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[8] Black's Law Dictionary (5th Edition): "*Predestined interpretation (interpretatio predestinata)* takes place if the interpreter, laboring under a strong bias of mind, makes the text subservient to his preconceived views or desires. This includes artful interpretation *(interpretatio vafer)*, by which the interpreter seeks to give a meaning to the text other than the one he knows to have been intended."

"*Construction distinguished.* In the strict usage of this term, 'construction' is a term of wider scope than 'interpretation'; for, while the latter is concerned only with ascertaining the sense and meaning of the subject-matter, the former may also

(Continued on following page)

by the Court can never be a license to rewrite the tables of multiplication or addition. Two plus two is four. It cannot be "interpreted" into five. The record neither supports nor justifies the holding of the Court of Appeals. This "consent Order," was not structured by the Court. It was a stipulation between counsel. The Court merely approved the stipulation. The Court of Appeals and the Trial Court have rewritten the stipulation in favor of one party, indeed, in favor of the party who drew the document, to the detriment of the other party, for the gross purpose of holding one party in default who had no knowledge even of the existence of either (1) the stipulation, (2) the Order, or (3) the lawsuit wherein he was defaulted. The judicial consensus is that ambiguities in a document are construed against the draftsman. Here there is not even an ambiguity. The Order has a date. The date is November 4, 1987. That date cannot now be changed by any Court or earthly body. If it could be, nothing would be a fact. The date of the Order is its date.

If service upon Harper is binding upon Ruben, it could only be by reason of the provisions in the consent Order. If Ruben is to be held to the terms of that Order, so should Home Port. The very Order under which Home Port seeks to hold Ruben within the jurisdiction of the Court expressly says that that option expired after 180 days.

The District Court did not have jurisdiction of Ruben. The Court of Appeals erred in holding that it did.

D. Ruben has been denied constitutional due process.

Since the fundamental requisite of due process of law is the opportunity to be heard,

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(Continued from previous page)

be directed to explaining the legal effects and consequences of the instrument in question. Hence interpretation precedes construction, but stops at the written text."

> this right to be heard has little reality or worth unless one is informed that the matter is pending and he can choose for himself whether to appear or default, acquiesce or contest.
>
> * * *
>
> But when notice is a person's due, process which is a mere gesture is not due process. . . . The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is itself reasonably certain to inform those affected, . . . *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 at pp. 314, 315.

"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67 (1972); citing *Baldwin v. Hale*, 68 U.S. 223, 233 (1 Wall.) (1854); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *Hovey v. Elliott*, 167 U.S. 409 (1896); *Grannis v. Ordean*, 234 U.S. 385 (1913).

Actual notice is the goal. *Hanna v. Plumer*, 380 U.S. 460, 462 (1965). This Court said in *Lankford v. Idaho*, ___ U.S. ___ (No. 88-7247; decided May 20, 1991):

> "Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in a strength of democratic faith which we profess. Due process is not a mechanical instrument. It is not a yard stick. It is a process."

Ruben has been denied due process.

QUESTION 2: THE REFUSAL OF THE DISTRICT COURT TO VACATE THE DEFAULT JUDGMENT AGAINST PETER RUBEN UNDER RULE 60(b) FED.R.CIV.P. WAS AN ABUSE OF DISCRETION AND THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT.

A. Excusable neglect was clearly established under Rule 60(b)(1) Fed.R.Civ.P. and the Court of Appeals erred in affirming the District Court's denial of relief.

The Court of Appeals noted that the District Court "concluded that Ruben could not be faulted for the delay in his motion" to vacate the judgment. (App. p. A-6) This was because the delay in filing the Motion to vacate the judgment was not caused by Ruben. He, through his California attorney, contacted attorney Chastain in South Carolina within ten days of receiving notice of the default judgment. "When the party is blameless and the attorney is at fault, the former interests control and a default judgment should ordinarily be set aside." *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988).

Nevertheless, the Court of Appeals affirmed the Trial Court's refusal to vacate the default judgment against Ruben by concluding that Ruben and Allen "by making themselves unavailable, have created these default judgments." (App. p. A-6) (App. p. A-31) Accordingly, what Ruben did *after* the entry of the default judgment has been found to be excusable. What he is accused of not having done *before* the entry of the judgment has not been excused by the Court of Appeals nor the District Court. The Court of Appeals supported its conclusion of affirming the District Court through a rationale of bootstraping its opinion with statements as being facts which are not facts in the record. Specifically, the Court of Appeals said:

(1) While the record does not reflect that Harper was expressly authorized to enter into the agreement or to accept service on the defendants' behalf, there is sufficient evidence to show that Harper, at the very least, was *impliedly authorized* to undertake both commitments on the defendants' behalf. (App. p. A-8)

(2) [Harper] *negotiated* and entered into the *consent agreement* on behalf of the defendants with the *full knowledge of defendant Allen*, who served as IYG's President and who acted on behalf of the corporation and the individual defendants throughout the action. (App. p. A-9)

(3) The day before the Court ordered the dismissal, Harper informed Allen by letter that the parties had *reached agreement on the consent terms* and that the case "had been" dismissed. (App. p. A-9)

(4) At the same time [by letter], Harper told Allen that Home Port could, under the terms of the *consent agreement*, reinstitute the suit. (App. p. A-9)

(5) *Both Allen and Ruben knew of the consent agreement* and *Order* dismissing the original action and that Allen – and probably Ruben – knew of the possibility that Home Port could reinstitute the suit within a *reasonably short period of time.* (App. p. A-9)

(6) Allen, if not also Ruben, at least *acquiesced* in if not agreed to, *having Harper serve as the defendants' liaison with both the Court and Home Port* on any developments in the matters subsequent to the dismissal. (App. p. A-9)

(7) [They were] *aware* that the action had been dismissed by Court *order entered upon an agreement negotiated* and *signed by Harper*

but that the action might be reinstituted, neither Allen nor Ruben initially requested to review a copy of the *consent agreement* or *Order* or subsequently inquired when a copy was not forthcoming. Neither objected to the dismissal or to *Harper's service in obtaining the dismissal.* (App. p. A-10)

(8) There was *testimony from Allen that Ruben knew that Home Port could reinstitute its suit within 180 days,****. If the District Court credited Allen's testimony that Ruben was aware that suit could be reinstituted *within a short period of time,* it could reasonably conclude, as it did, that Ruben purposely did not inform his attorney or the Court of his whereabouts for the "ulterior motive" of avoiding process. (App. p. A-13) [Emphasis added.]

The only letter Harper wrote about the dismissal of the first action was the letter of November 3, 1987 to Allen. The text of this letter is set forth verbatim: (App. pp. A-37-38)

> This is to advise you that the above referenced suit against International Yachting Group has been dismissed by the Federal Court. This dismissal is of the kind that McEachern does have the right to bring the suit again, but in all honesty, I do not expect that to happen. If it does, however, I will let you know and keep you posted on developments in this matter.
>
> I am glad that so far, things seem to be going well, and that I believe that there is no further action on my part. Also, enclosed please find our bill for services rendered in the matter. It was a pleasure working with you, and if you should need assistance in this or any other matter in the future, please do not hesitate to contact me.
>
> Thank you, and with best wishes, I am

Harper's letter does not imply in any way, nor can an inference be drawn:

(1) That Allen and Ruben acquiesced in having Harper serve as defendants' liaison with the Court and Home Port;

(2) That Allen and Ruben knew Home Port could reinstitute its suit within 180 days;

(3) That Allen and Ruben knew Home Port could reinstitute its suit within a short period of time;

(4) That there was a time frame in which another action could be instituted;

(5) That Harper had entered into a consent agreement on behalf of the defendants;

(6) That Harper had negotiated an agreement with the knowledge of Allen;

(7) That Harper had reached agreement on consent terms;

(8) That there was a consent agreement;

(9) That Allen and Ruben knew of the consent agreement;

(10) That there was an agreement;

(11) That Allen and Ruben were aware that the dismissal was upon a Court order entered upon an agreement negotiated by Harper;

(12) That Allen and Ruben were aware that the dismissal was upon a Court order entered upon an agreement signed by Harper;

(13) That Harper obtained the dismissal;

(14) That the Order was negotiated;

(15) That Harper was impliedly authorized to enter into the stipulations in the Order;

(16) That the Order had terms;

(17) That Allen and Ruben knew of the Order; or

(18) *That an Order had even been entered*!

All the letter says is that the "suit against International Yachting Group has been dismissed by the Federal Court." From this limited language, the created facts that appear in the Court of Appeals' opinion are inferred and improperly so; there is no factual basis for the inference. Upon this inference, the Court of Appeals has concluded that the District Court did not abuse its discretion in finding that Ruben had not established that *he* was not responsible for the default judgment. The letter describes the suit as against the *International Yachting Group*. It does not mention the individual defendants. This is how the suit was perceived by the defendants and by Harper. Nothing in the letter alerted Allen to a suit against the individuals.

The Court of Appeals' statement that Allen and Ruben acquiesced in having Harper serve as their "liaison with both the Court and Home Port on any developments in the matter subsequent to the dismissal" is strange. Once the action was dismissed the Court no longer had any jurisdiction of the parties. There was nothing pending in the Court to effect liaison between Ruben and the Court. Harper's letter indicated the exact opposite when he said, "I believe that there is no further action on my part." (App. p. A-37) From this the Court of Appeals infers that Harper is informing Allen that he will continue to act as a "liaison" between Allen and the Court. In its opinion, the Court of Appeals referred to the statement in the Harper motion to be relieved as counsel that the defendants were "fully aware of the consent Order and the new proceeding." (App. p. A-4) Harper's memorandum in support of his Motion, dated August 1, 1988, says that the defendants were fully aware "that a new proceeding was being instituted." (App. p. A-63) More importantly, however, is the fact that at the time Harper's Motion to be relieved was heard by the Court on August 25, 1988, the Court specifically inquired of Harper as to whether the defendants had actual notice that the second suit had been instituted. In response

Harper informed the Court that there was no assurance that any one of the defendants were aware that they had been sued.

> [The Court] And I wouldn't have any qualms about putting them in default now and striking your counterclaim, if I knew for a fact that they knew that they had been sued. I am talking about the 180 day Complaint, and knew for a fact that you had answered. But I gather from what you-all are telling me, that we don't have any assurance that any one of the three of them are aware of that, do we?
>
> Mr. Harper: No, sir, we do not. (App. p. A-77)[9]

The bent of the Court of Appeals to adopt an earlier mistatement of a fact by Harper in his memorandum as *the* fact, when Harper had straightforwardly stated his correction thereof to the Court and had confirmed it subsequently in his Affidavit, is more than disappointing. The Court of Appeals faults Ruben for not making inquiries about an Order and the terms of the Order and not requesting a copy of the Order when he was never informed that an Order of any kind had in fact been entered. This has been labelled by the Court of Appeals as due process of law. The label does not fit.

Allen did not say in his Affidavit that he informed Ruben that Home Port could reinstitute its suit within 180 days, as the opinion of the Court of Appeals says. Allen could not inform Ruben of something he did not know. Allen said that in a telephone conversation with Ruben he "told him the contents of [Harper's] letter." (App. p. A-125) The Harper letter of November 3, 1987 was the last communication from Harper to Allen. (App. p. A-125)

The conclusion by the Court of Appeals, affirming the District Court, that Home Port would be prejudiced if

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[9] Harper confirmed this again in his Affidavit of January 16, 1991. (App. pp. A-138-139)

the default judgment were vacated was for the stated reasons that the former controller [sic] of International who had maintained the financial records had disappeared and that at least two of the defendants could not be found. (App. p. A-141) There is no evidence in the record that the two defendants, Roger Moore and Jim Edwards, were ever available at any time or would have been witnesses for Home Port. The former controller [sic] of International, Edward Wilcox, III (App. p. A-141) was not a witness at the damages hearing. He was not named as a witness in Home Port's required Answers to 16(b) Interrogatories filed with the Court. (App. pp. A-52-57) At the time of Home Port's evidentiary hearing on the default damages hearing, it took only six minutes for Home Port's President to present the evidence. Nevertheless, the Court of Appeals found this to be "substantial evidence" to support prejudice. This has also been labelled due process of law by the Court of Appeals. The label still does not fit. Abuse of discretion is not an acceptable substitute for due process of law.

B. Ruben established entitlement to relief under Rule 60(b)(6) Fed.R.Civ.P. and the Court of Appeals erred in affirming the District Court's denial of relief.

The ground upon which the District Court entered default against Ruben was that the defendants failed to participate in discovery. Ruben was faulted for not participating in discovery in an action he did not know he was a party to. The Court of Appeals found that the default judgment was authorized by Rule 55 Fed.R.Civ.P.

Rule 55(d) of the Fed.R.Civ.P. says:

> In all cases a judgment by default is subject to the limitations of Rule 54(c).

Rule 54(c) of the Fed.R.Civ.P. provides:

> A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

Judgment has been entered against Ruben under the March 16, 1989 Order of the Court beyond what was sought by Home Port in its Complaint, in violation of the express limitations and prohibitions of Rule 54(c) and Rule 55(d) of the Fed.R.Civ.P. The March 16, 1989 Order of the District Court expressly held, (App. p. A-99)

> Thus, if the Court is to award the benefit of plaintiff's bargain under the second cause of action, it cannot *also* compensate plaintiff for is [sic] out-of-pocket expenses. (Emphasis added.)

Accordingly, because the Court did award the benefit of plaintiff's bargain under the second cause of action, there was no award under the first and third causes of action inasmuch as Home Port had been compensated for all damages under the second cause of action in its Complaint. Because there was no award under the third cause of action, no judgment should have been entered against Ruben.

The only cause of action alleged against Ruben in Home Port's Complaint was the third cause of action based upon the South Carolina Securities Statute. Under Section 35-1-1490(2) of the S. C. Code Ann. the amount of damage allowed is

> the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorney fees, less the amount of any income received on the security***.

Under the allegations of its Complaint, Home Port paid International a $17,000.00 deposit on the boat purchase. (App. p. A-44) It purchased a "Club Nautico" concept at a price of $90,000.00. (App. p. A-47) International counterclaimed against Home Port on the unpaid $90,000.00 note for this purchase. This counterclaim was stricken with prejudice by the Court in the default Order entered October 31, 1988. (App. p. A-87) Accordingly, Home Port has never paid and will never have to pay [if the Court had jurisdiction] the $90,000.00 note as consideration. Under the allegations of its Complaint, Home Port paid

$17,000.00 which is the total "consideration paid for the security." Therefore, the amount of damages found by the Court under the third cause of action of $469,026.21 exceeded the amount alleged in Home Port's Complaint and exceeded the amount permitted by the statute upon which the third cause of action was based. Applying the demand in the Complaint of Home Port to the requirements of Rules 54(c) and 55(d) Fed.R.Civ.P., no more than $17,000.00 plus interest thereon at six percent should have been awarded in favor of Home Port against Ruben. This is more than justification for relief under Rule 60(b)(6). The District Court abused its discretion. The Court of Appeals compounded the error by affirming the District Court.

CONCLUSION

Denial of Ruben's Petition for Certiorari will put this Court's stamp of approval upon the travesty. Denial of his Petition will perpetuate the conviction that justice has been perverted, because it has; that wrong has prevailed over right, because it has; and that belief in and reliance upon the basic institutions of our nation have suffered another needless wound, because they have.

Conversely, by the mere stroke of an enlightened judicial pen, the error can be corrected, the wrong righted, and faith in the justness of the judicial process and the integrity of the judicial system can be enhanced and nurtured in truth and in fact. The Petition should be granted.

All of which is respectfully submitted.

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May 26, 1992

APPENDIX

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOME PORT RENTALS, INCORPORATED,

Plaintiff-Appellee,

v.

PETER RUBEN,

Defendant-Appellant,

and

THE INTERNATIONAL YACHTING GROUP, INCORPORATED, a Florida corporation; DENNY ALLEN; ROGER MOORE; JIM EDWARDS,

Defendants.

No. 91-2096

HOME PORT RENTALS, INCORPORATED,

Plaintiff-Appellee,

v.

DENNY ALLEN,

Defendant-Appellant,

and

THE INTERNATIONAL YACHTING GROUP, INCORPORATED, a Florida corporation; PETER RUBEN; ROGER MOORE; JIM EDWARDS,

Defendants.

No. 91-2107

Appeals from the United States District Court
for the District of South Carolina, at Charleston.
Falcon B. Hawkins, Chief District Judge.
(CA-88-1167-2-1)

Argued: December 2, 1991

Decided: February 25, 1992

Before POWELL, Associate Judge (Retired), United States Supreme Court, sitting by designation, and WILKINSON and LUTTIG, Circuit Judges.

Affirmed by published opinion. Judge Luttig wrote the opinion, in which Justice Powell and Judge Wilkinson joined.

COUNSEL

ARGUED: T. English McCutchen III, WHALEY, MCCUTCHEN, BLANTON & RHODES, Columbia, South Carolina, for Appellant Ruben; Andrew K. Epting, WISE & COLE, Charleston, South Carolina, for Appellant Allen. Daryl James Corbin, LAW OFFICES OF DARYL J. CORBIN, Florence, South Carolina, for Appellee. **ON BRIEF:** Ronald James Tryon, WHALEY, MCCUTCHEN, BLANTON & RHODES, Columbia, South Carolina, for Appellant Ruben; D. K. Tennyson, WISE & COLE, Charleston, South Carolina, for Appellant Allen. W. Carole Holloway, LAW OFFICES OF DARYL J. CORBIN, Florence, South Carolina, for Appellee.

OPINION

LUTTIG, Circuit Judge:

The United States District Court for the District of South Carolina granted default judgment against International Yachting Group, Inc., Peter Ruben, Denny Allen,

and two other individuals, and thereafter denied motions filed by Ruben and Allen to vacate the judgment. Ruben and Allen appeal the district court's judgment. We affirm.

I.

Defendant International Yachting Group, Inc. (IYG), entered three boat franchise lease agreements with plaintiff-appellee Home Port Rentals, Inc. ("Home Port") in 1985. *See* J.A. at 240, 272, 289. IYG subsequently sold its assets to Adventurent, Inc., and both IYG and Adventurent moved operations from IYG's original Dania, Florida, address to Fort Lauderdale, Florida. *See id.* at 281. IYG had ceased all operations by December 1986. *See id.*

On August 13, 1986, Home Port filed suit against IYG, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards in the United States District Court for the District of South Carolina. *See id.* at 205, 290. Ruben was IYG's chairman of the board, *see id.* at 281, and Allen its president, *see id.* at 289. Moore and Edwards were employees of the corporation. *See id.* at 407. F. Mikell Harper represented IYG and the individual defendants in the action. *See id.* at 291.

In late 1987, Home Port and the defendants agreed to dismiss the suit without prejudice. On November 3, 1987, Harper wrote to Allen at IYG's For Lauderdale address to inform him of the dismissal. *See id.* at 252. The next day, the district court signed the consent agreement granting Home Port a voluntary nonsuit without prejudice. *Id.* at 33-34. The agreement provided that the defendants would submit to the court's jurisdiction and that they would appoint Harper to accept service of process in a

refiled suit so long as "such proceedings [were] commenced by the plaintiff no later than 180 days from the date of this Order." *Id.* The clerk of court filed the order on November 13 and entered it on November 17. *See id.*

Adventurent's receptionist, a former IYG employee, forwarded Harper's November 3, 1987, letter from Fort Lauderdale to Allen at Allen's new address in Keller, Texas. *See id.* at 290. Allen in turn told Ruben of the dismissal and of the contents of Harper's letter. *See id.* at 82, 291.

On May 4, 1988, Home Port refiled its suit against the defendants. *See id.* at 6-14. On May 25, 1988, Harper sent a certified letter to Allen at IYG's former Fort Lauderdale address, enclosing a copy of both Home Port's and the defendants' pleadings, a motion to dismiss, a supporting memorandum, and a request for Allen's new address and telephone number. *See id.* at 275. And on May 26, 1988, Harper filed responsive pleadings with the district court on behalf of the defendants. *See id.* at 25-32.

Harper's May 25 letter to Allen was returned unopened. *See id.* at 388. Harper attempted unsuccessfully to persuade Adventurent's attorney to assist in locating the individual defendants. *See id.* at 255-56. Harper then filed a motion to withdraw as counsel for the defendants. *See id.* at 40-44. His motion stated that the defendants were fully aware of the consent order and the new proceeding; that he had made a diligent but futile search for the defendants; and that the defendants were unable or unwilling to cooperate. *See id.* at 43. At about this time, Ruben moved from Florida to Mill Valley, California. *See id.* at 84, 283. The record does not reflect that Allen or

Ruben ever disclosed Ruben's new address to Harper. *See id.* at 416.

On August 25, 1988, the district court proposed to issue a rule to show cause why the defendants should not be held in default, *see id.* at 51, and on September 23, 1988, it issued a show cause rule, *see id.* at 279-80. The court served the rule on the defendants by registered mail at their last known addresses. *See id.* at 423, 425, 428, 430, 432. The registered letters to Allen, Ruben, and IYG were returned unaccepted. *See id.* at 425, 430, 432.

Neither Harper nor any of the defendants appeared at the October 24, 1988, show cause hearing. *See id.* at 57. Thereupon, the court granted Harper's motion to withdraw as defendants' counsel. *See id.* at 61. And on October 31, 1988, the court held the defendants in default for failing to cooperate in discovery, refusing to submit to depositions, and failing to participate in the defense of the suit. *See id.* at 62-64. After a default judgment hearing, the court on March 16, 1989, awarded Home Port $1.2 million in actual damages and $50,000 in punitive damages. *See id.* at 73-76.

On March 23, 1989, the court sent a copy of the default judgment order to Ruben at the same address to which the court had sent prior notices. *See id.* at 77. The husband of a former IYG employee received the letter at that address and forwarded it to Ruben's California address. *See id.* at 83. Ruben received the letter on April 1, 1989, and two days later telephoned a San Francisco attorney, who helped arrange representation for Ruben by a South Carolina attorney. *See id.* at 304, 317. The South Carolina attorney did not file a motion to vacate the

judgment until March 14, 1990, nearly a year later. *See id.* at 79-80.

On July 17, 1990, the district court denied Ruben's motion to vacate the judgment on the grounds that Ruben failed to act promptly after receiving notice of default, *see id.* at 163, and that vacating the default judgment would unfairly require Home Port to rely on stale evidence, *see id.* at 164. The court held that the defendants' waiver of defenses in the consent order dismissing Home Port's original suit conferred upon the court personal jurisdiction over Ruben. *See id.* at 165-66.

Ruben filed a motion to reconsider the court's refusal to vacate the judgment on August 15, 1990, *id.* at 171-77, and Allen filed a similar motion on November 27, 1990, twenty months after the judgment, *id.* at 325-26. In its April 25, 1991, order denying both motions, the court restated its suspicions that Ruben and Allen had attempted to evade Harper after the consent order was entered. *See id.* at 416-17. After reconsidering whether Ruben had acted promptly in seeking relief from default, the court concluded that Ruben could not be faulted for the delay in his motion. *See id.* at 417. Nevertheless, the court refused to grant the requested relief from judgment, holding that Ruben and Allen, "by making themselves unavailable, have created these default judgments." *Id.* at 418.

Ruben and Allen appealed the district court's entry of default judgment and order denying relief from judgment.

II.

Ruben and Allen raise four challenges to the district court's refusal to relieve them from default judgment. First, both appellants argue that the district court erred in refusing to vacate the default judgment as void for lack of personal jurisdiction and ineffective service of process. *See* Fed. R. Civ. P. 60(b)(4). Second, Ruben argues that the district court abused its discretion in refusing to vacate the judgment against him on the grounds of "excusable neglect." *See* Fed. R. Civ. P. 60(b)(1). Third, Allen argues that the district court abused its discretion in refusing to vacate the judgment against him for "any other reason justifying relief." *See* Fed. R. Civ. P. 60(b)(6). Finally, both appellants argue that the district court's decision to impose default judgment in itself constituted an abuse of discretion. None of these arguments is persuasive.

A.

Ruben and Allen argue that the district court's default judgment should be vacated because the court lacked personal jurisdiction over them and because service of their copies of the court's orders and the parties' pleadings through Harper was unauthorized. The district court rejected these arguments on the grounds that the defendants had waived their personal jurisdiction and service of process defenses by the terms of the consent agreement they entered into with Home Port.

The parties' agreement, upon which the court's consent order was based, reads as follows:

> (1) The Plaintiff shall be granted a voluntary non-suit without prejudice;

> (2) The Court shall exert jurisdiction over the above-named parties arising from any action instituted by the Plaintiff, *provided that,* such proceedings are instituted no later than 180 days from the date of this Order;
>
> . . .
>
> (4) F. Mikell Harper, Esquire, attorney for the above-named defendants, shall accept on behalf of such Defendants service of process arising from legal proceedings instituted by the Plaintiff, *provided that,* such proceedings are commenced by the Plaintiff no later than 180 days from the date of this Order.

J.A. at 33-34. Thus, under the terms of the consent order, Home Port's original action was dismissed upon appellants' agreement to waive any objections to the court's assertion of personal jurisdiction and to authorize Harper to receive service of process on their behalf. The appellants advance two arguments to avoid what they must concede would otherwise be the dispositive adverse consequences of the agreement's terms on their personal jurisdiction and service of process claims.

First, they contend that neither Allen nor Ruben authorized Harper to enter into the consent agreement or to accept process on behalf of the defendants with respect to the reinstituted suit. *See* Appellants' Br. at 23. While the record does not reflect that Harper was expressly authorized to enter into the agreement or to accept service on the defendants' behalf, there is sufficient evidence to show that Harper, at the very least, was impliedly authorized to undertake both commitments on the defendants' behalf.

Harper served as counsel for the defendants throughout the original litigation. He negotiated and entered into the consent agreement on behalf of the defendants with the full knowledge of defendant Allen, who served as IYG's president and who acted on behalf of the corporation and the individual defendants throughout the action. *See* J.A. at 290. The record shows that the day before the court ordered the dismissal, Harper informed Allen by letter that the parties had reached agreement on the consent terms and that the case "ha[d] been" dismissed. *Id.* at 252. At the same time, Harper told Allen that Home Port could, under the terms of the consent agreement, reinstitute the suit. *See id.* Finally, Harper observed that "so far, things seem to be going well" and assured Allen that he would "keep [him] posted on developments in this matter," although he did not expect further action to be necessary. *Id.* Allen in turn informed Ruben of the dismissal and of "the contents of [Harper's] letter," which included reference to Home Port's right to reinstitute suit. *Id.* at 291; *see also id.* at 82. There is also other evidence in the record that Ruben knew that the suit could be reinstituted. *See id.* at 389.

The record thus reflects that both Allen and Ruben knew of the consent agreement and order dismissing the original action, and that Allen – and probably Ruben – knew of the possibility that Home Port could reinstitute the suit within a reasonably short period of time. It also shows that Allen, if not also Ruben, at least acquiesced in, if not agreed to, having Harper serve as the defendants' liaison with both the court and Home Port on any developments in the matter subsequent to the dismissal. Allen was informed by Harper that he intended to apprise him

if the suit were reinstituted and to "keep [him] posted on developments in the matter," and Allen apparently accepted Harper's commitment without protest. Ruben also presumably knew that Harper intended to continue to monitor the matter and to keep the defendants posted on further developments. Allen's affidavit recites that he informed Ruben of the contents of Harper's letter, which included the statement that Harper intended to keep Allen posted on future developments in the case.

Aware that the action had been dismissed by court order entered upon an agreement negotiated and signed by Harper but that the action might be reinstituted, nether Allen nor Ruben initially requested to review a copy of the consent agreement or order or subsequently inquired when a copy was not forthcoming. Neither objected to the dismissal or to Harper's service in obtaining the dismissal. And neither objected to Harper's stated intention to apprise them of further developments in the matter. Particularly when viewed against the backdrop of Harper's representation of the defendants throughout the original action, this is ample support for the district court's finding that Harper was authorized to act on behalf of the defendants in entering into the consent agreement and in accepting service on the defendants' behalf.

Appellants contend in the alternative that any waiver of defenses included within their consent agreement never took effect because Home Port failed to comply with the consent order's condition that reinstitution of suit occur "no later than 180 days from the date of this Order." *Id.* at 34. Whether Home Port filed within the time period required by the consent order turns on

whether the court meant by the phrase "the date of this Order" to refer to November 4, 1987, the date on which the court signed the consent order, *see id.* at 34, or to November 13, 1987, the date on which the order became effective, *id.* at 166; *see* Fed. R. Civ. P. 58 ("[A] judgment is effective only when . . . entered as provided in Rule 79(a)."). The district court found that "the relevant date for computation of time is the date the order was filed in the Clerk of the Court's Office, November 13, 1987." J.A. at 166. Because Home Port refiled its action on May 4, 1988, *see id.* at 6-14, 172 days after the consent order was filed with the Clerk of the Court, the court concluded that the refiled action was timely.

Appellants urge us to hold that the phrase "the date of this Order" is the date the court signed the consent order. If the phrase were interpreted in this manner, the 180th day from the date of the order would have been May 2, 1988, two days before Home Port refiled its suit, and therefore the suit would have been barred by the terms of the order. It is not clear from the face of the consent order which date the court considered to be the date of the order. It is peculiarly within the province of the district court, however, to determine the meaning of its own order. *See, e.g., Kendrick v. Peters*, 931 F.2d 421, 423 (6th Cir. 1991); *Vaughns v. Board of Education*, 758 F.2d 983, 989 (4th Cir. 1985). While it is certainly not unreasonable to assume that the date of the order is the date on which the order was signed, as appellants argue, *see* Appellants' Br. at 32-33, we cannot say that the district court abused its discretion in interpreting its order in the manner that it did. We therefore reject appellants' argument that

Home Port's action was barred by the terms of the district court's consent order.

Accordingly, because Allen and Ruben are bound by the terms of the consent order entered upon their agreement with Home Port, and because Home Port refiled its action within the time period set forth in the order, we affirm the district court's holding that appellants waived their personal jurisdiction and service of process defenses.

B.

The district court denied appellant Ruben's motion for relief from default judgment under Fed. R. Civ. P. 60(b)(1). Ruben had argued that he be relieved from judgment because of "excusable neglect." Ruben contends on appeal that the district court's denial of this motion was an abuse of discretion. We disagree.

Rule 60(b)(1) authorizes a court to relieve a party of a final judgment because of "excusable neglect." To obtain relief under the Rule, a party must demonstrate *inter alia* that he was not at fault and that the nonmoving party will not be prejudiced by the relief from judgment. *See, e.g., Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988). The district court concluded that Ruben had not established either that he was not responsible for the default judgment or that Home Port would not be prejudiced by the requested relief. Both determinations were well within the court's discretion on the record before it. *See Werner v. Carbo*, 731 F.2d 204, 206 (4th Cir. 1984) (stating that this court "will not . . . disturb[]" a district court's decision on a Rule

60(b) motion "absent a showing of abuse of . . . discretion").

There is sufficient evidence to support the district court's conclusion that Ruben was at fault for the judgment because he intentionally made himself unavailable during the eleven months between the original dismissal and the default judgment. There was testimony from Allen that Ruben knew that Home Port could reinstitute its suit within 180 days, *see* J.A. at 291, and it is undisputed that Ruben never informed Harper or the district court of his whereabouts. If the district court credited Allen's testimony that Ruben was aware that suit could be reinstituted within a short period of time, it could reasonably conclude, as it did, that Ruben purposely did not inform his attorney or the court of his whereabouts for the "ulterior motive[]" of avoiding process. *Id.* at 416. Such a conclusion is further supported by the testimony that persons employed by Adventurent, the successor corporation to IYG of which Allen and Ruben were shareholders, appeared intentionally unwilling to assist Harper in locating the defendants. Harper indicated, for example, that Adventurent's attorney essentially refused to assist him in locating Ruben. *See id.* at 255-56. Harper also testified that his secretary found the staff at Adventurent "generally uncooperative" and unwilling to provide assistance in locating Ruben. *See id.* at 388. This conclusion is also supported by the fact that Ruben apparently did receive correspondence when he wished; he had received a copy of the default judgment itself within days of its entry. *See id.* at 284.

There was also substantial evidence to support the district court's determination that Home Port would be

prejudiced if the default judgment were vacated. By the time Ruben's motion to vacate was filed, IYG had ceased operations and at least two of the defendants could not be found. There was also evidence that one of Home Port's key witnesses, the former controller of IYG who had maintained the financial records of the corporation, had disappeared and that Home Port would have difficulty reconstructing its documentary evidence. *See id.* at 411-412.

Therefore, we affirm the district court's decision to deny Ruben's Rule 60(b)(1) motion.

C.

Allen also moved for relief from default judgment on the same facts underlying Ruben's Rule 60(b)(1) motion. Because he made his motion more "than one year after the judgment . . . was entered," however, he could not seek relief under Rule 60(b)(1). He therefore moved for relief under Fed. R. Civ. P. 60(b)(6), which permits the court to vacate a final judgment for "any other reason justifying relief from the operation of the judgment." The district court denied Allen's motion for the same reasons it denied Ruben's motion.

It is apparent from the fact that Allen relies upon the same evidence and the same arguments that Ruben relies upon that Allen's Rule 60(b)(6) motion is merely an attempt to circumvent the time limitations under Rule 60(b)(1). A litigant may not move for relief under Rule 60(b)(6) in order to circumvent the applicable time limits on motions under other subsections of Rule 60(b). *See Great Coastal Express, Inc. v. International Bhd. of Teamsters*

of Am., 675 F.2d 1349, 1355 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983). We therefore affirm the district court's denial of Allen's motion.

D.

Both Ruben and Allen argue finally that the district court abused its discretion in imposing default judgment as a sanction for the defendants' failure to participate in discovery. *See* J.A. at 62-63. We disagree.

Two separate provisions of the Federal Rules of Civil Procedure provide for the entry of default judgment. Under Rule 37, a court may issue "[a]n order . . . rendering a judgment by default" if a party disobeys a discovery order issued under Rules 35, 37(a), or 26(f), *see* Fed. R. Civ. P. 37(b)(2)(C), or if a party fails to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection, *see* Fed. R. Civ. P. 37(d). Default judgment is also available under Rule 55 "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise." Fed. R. Civ. P. 55(a).

The district court did not recite whether it was issuing its default judgment pursuant to Rule 37 or Rule 55. The court identified three justifications for the order. "(a) lack of the Defendants' cooperation in discovery matters; (b) refusal of the . . . Defendants to submit to depositions; and (c) failure of the . . . Defendants to participate in prosecution and defense of the above-captioned matter." J.A. at 62. Appellants contend that the default judgment was ordered under Rule 37, *see* Appellants' Br. at 44-46,

and that because they did not commit any of the discovery abuses enumerated in that rule as predicates to default, the court abused its discretion in entering the default judgment.

The court's reference to the defendants' failure to cooperate in discovery and to submit to depositions supports the appellants' characterization of the order as one entered under Rule 37. The other asserted basis for the court's ruling, however, was that the appellants "fail[ed] . . . to participate in prosecution and defense" of the action. This ground, if supported by the record, is sufficient to permit us to treat the order as one entered under Rule 55. A review of the record reveals that there is ample evidence to support a finding that the defendants did fail to defend the action. The defendants did not appear at the show cause hearing, *see* J.A. at 60, and they did not respond to certified notices sent by the court, *see id.* at 63. Counsel for both sides in fact repeatedly reminded the court that none of the defendants participated in the defense of Home Port's suit. *See id.* at 46-56, 58-60. Thus, even if we assume that the district court lacked authority in this case to impose default judgment under Rule 37, its judgment nonetheless would be authorized under Rule 55 because of the defendants' failure to defend. We therefore affirm the court's decision to enter default judgment on the ground of appellants' failure "to plead or otherwise defend as provided by" the Federal Rules of Civil Procedure. Fed. R. Civ. P. 55(a).

CONCLUSION

For the reasons state herein, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

March 23, 1992

No. 91-2096

HOME PORT RENTALS, INCORPORATED

Plaintiff-Appellee

v.

PETER RUBEN

Defendant-Appellant

and

THE INTERNATIONAL YACHTING GROUP, INCORPORATED, a Florida Corporation; DENNY ALLEN; ROGER MOORE; JIM EDWARDS

Defendants

No. 91-2107
CA-88-1167-2-1

HOME PORT RENTALS, INCORPORATED

Plaintiff-Appellee

v.

DENNY ALLEN

Defendant-Appellant

and

THE INTERNATIONAL YACHTING GROUP, INCORPORATED, a Florida Corporation; PETER RUBEN; ROGER MOORE; JIM EDWARDS

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HOME PORT RENTALS, INC., Plaintiff, vs. THE INTERNATIONAL YACHTING GROUP, INC,. A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS, Defendants.	CIVIL ACTION #2:88-1167-1 ORDER (Filed July 17, 1990)

By motion filed March 14, 1990, defendant Peter Ruben (hereinafter "Ruben") seeks relief from a default judgment entered against him and four other defendants on October 31, 1988. Ruben also seeks to strike the plaintiffs' opposition pleading. As a basis for relief, defendant asserts three grounds: 1) excusable neglect, inadvertence, surprise, or mistake; 2) judgment is void for lack of jurisdiction; and 3) neither plaintiff nor defendants' attorney took adequate steps to locate the defendants. In its order of October 31, 1988, this court found the defendants in default, struck the counterclaims of the defendants with prejudice, and awarded damages of $1,250,000 plus interest. After receiving submissions from the parties, the court heard oral argument on July 10, 1990, concerning Ruben's request for relief from the default judgment, and took the matter under advisement.

BACKGROUND

The first litigation in this matter started in August of 1986. The dispute arose in part out of a purchase of outboard engines and boats for about $360,000 as well as the $90,000 purchase of a "Club Nautico", an investment concept which involved motorboat leasing. Plaintiff's complaint alleged breach of contract, fraud, and securities violations under South Carolina law. That action was held in abeyance by a consent order filed on November 17, 1987. In that consent order, Ruben's attorney agreed to accept service of process for the defendants should the suit be recommenced. When the matter was not resolved, plaintiff served the complaint on defendants' attorney, Mikell Harper, on May 4, 1988. The court further attempted to notify the defendants at their last known address, Dania, Florida, by certified mail. Harper attested he also attempted to contact his clients. Neither method ended up being successful. Harper accepted service and filed an answer, a counterclaim, and several motions.

ANALYSIS

Rule 60(b), Federal Rules of Civil Procedure, provides the means for a court to relieve a party from a final judgment on any one of six grounds. The primary ground for relief though is "mistake, inadvertence, surprise, or excusable neglect." *Augusta Fiberglass Coatings v. Fodor Contracting*, 843 F.2d 808, 810 (4th Cir. 1988). The moving party must show that it acted with reasonable diligence in seeking to set aside the default and it must also tender a meritorious defense. *United States v. Moradi*, 673 F.2d 725, 727 (4th Cir. 1982). In addressing a default judgment,

the court is also cognizant of Fed.R.Civ.P. 55(c), which states that "[f]or good cause shown, the court may set aside an entry of default, and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." The district court has broad discretion in reviewing such motions. *See Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894, 896 (4th Cir. 1987). The Fourth Circuit has also specified some criteria for courts to consider in reviewing these motions. *Moradi*, 673 at 728; *see also Lolatchy v. Authur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987). The *Moradi* factors include: the personal responsibility of the moving party; the prejudice to the non-moving party; whether there is a history of dilatory action on the part of the moving party, and the availability of sanctions less drastic.[1] 673 F.2d at 728. The Fourth Circuit has also been particularly concerned that an innocent client not be punished by default for the sins of the attorney. *Lolatchy*, 816 F.2d at 953 (court reversed imposition of default judgment as a sanction for discovery abuses where defendants were blameless and lesser sanctions were available). This apportionment of fault represents an accommodation of the court's preference for trials on the merits and the need for finality and efficiency in litigation. *Augusta Fiberglass Coatings*, 843 F.2d at 811.

Ruben contends that he should be relieved from this default judgment for three reasons: 1) excusable neglect, inadvertence, surprise, or mistake; 2) that the judgment is

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[1] The final factor discussed in *Moradi* is not relevant in an action dismissed under Rule 55 of the Federal Rules of Civil Procedure.

void as to him for want of jurisdiction; and 3) that no proper and adequate steps were taken to locate Ruben by either his attorney or the plaintiff. However, in applying the law to these facts, the court finds that the defendant should not be relieved from the default.

The first factor to consider is whether Ruben acted promptly. On March 20, 1989, this court entered a default judgment against Ruben and several other defendants. In his affidavit on page three, Ruben states that in March of 1989, he was forwarded a letter which contained the default judgment entered by this court. Clearly Ruben received the default judgment several days after it was entered and several weeks before the expiration of the time in which he could have appealed the order under Fed.R.Civ.P. 4(a)(1). At this point, Ruben indisputably had actual notice. Although Ruben alleges that he attempted to contact his attorney, Ruben waited to take further action. On March 14, 1990, almost a year later, Ruben had a new attorney petition the court for relief from that default judgment. The court finds that Ruben did not act with due diligence.

The next factor to consider is whether the plaintiff will suffer any unfair prejudice. The prejudice suffered by any party which loses the victory it gained through default judgement is not unfair prejudice. *Augusta Fiberglass Coatings*, 843 F.2d at 812. This case has been going on for a long time. It has been going on even longer because of the neglect of Ruben. As the plaintiff pointed out, the memories of the witnesses are dulled with time and a case grows stale. The plaintiff should not have to bear the responsibility of an aging case when they have

cooperated fully while Ruben and the other defendants have not.

The defendants have shown a history of dilatory action. For instance, the plaintiff agreed to dismiss the first action because the defendants were not ready for trial. Now, Ruben has delayed this action further by letting the default judgment stand for a year before challenging it.

Ruben also contends that his attorney and the plaintiff did not make adequate attempts to notify him. However, the record provides numerous instances of attempts to the contrary. Mikell Harper, Ruben's attorney, made a motion on August 2, 1988, to withdraw his appearance as the attorney for the defendants for several reasons. Harper states:

> 1. That, pursuant to Consent Order filed November 4, 1987, F. Mikell Harper agreed to accept service for the Defendants, and Defendants were fully aware of said Consent Order and the fact that a new proceeding was being instituted in said court.
>
> 2. That the whereabouts of Defendants The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore and Jim Edwards are unknown and that Attorney for Defendants has made an exhaustive and diligent search for Defendants.
>
> 3. Attorney for Defendants submits that Defendants are unwilling or unable to cooperate or to contact F. Mikell Harper concerning the defense of this action.

Harper's signed pleading states that he made an "exhaustive and diligent search." Perhaps the defendants conveniently avoided communication with Harper. The court also tried to notify the defendants but had no success. Finally, the plaintiff made other attempts to notify the defendants. In particular, the plaintiff took out an advertisement in a newspaper of general circulation in Broward County, Florida, the last known address of Ruben, publishing the court's "Rule to Show Cause" why defendants should not be held in default. Despite all this, Ruben still contends that he had no advance notice of the default and that he could have been located by any of the parties who tried. The court finds that the efforts made to locate the defendants were sufficient.

Lastly, Ruben has asserted the Rule 60(b) ground that the default judgment is void for lack of jurisdiction. Ruben also raised the jurisdictional argument in a Rule 12(b)(6) motion which is included in the current motion as an example of a meritorious defense. Since the analysis of jurisdiction will be the same, the court will address both points together. This jurisdictional argument finds its genesis in the contract that the plaintiff executed with the defendants. This franchise agreement said that disputes would be settled in the Florida courts. However, on November 17, 1987, the parties entered into a consent order executed by defense counsel expressly waiving this defense if suit was filed within 180 days from the date of the order. Despite filing a number of pleadings, Harper did not raise any issue with respect to this 180 days when the plaintiff refiled this suit. Nonetheless, Ruben's current counsel contends that the action was not recommenced within the 180 days. While this argument may

have been waived by Harper since he did not raise it, the court still finds that the plaintiff refiled the suit within the proscribed time. Although the order was signed on November 4, 1987, the relevant date for computation of time is the date the order was filed in the Clerk of Court's Office, November 13, 1987. On May 4, 1988, the plaintiff refiled the suit, 172 days after its consent order was filed. Since the case was refiled correctly, the plaintiff lacks a meritorious jurisdictional defense.

After considering all the points raised[2], this court is of the opinion that Ruben has not raised sufficient grounds for relief from the default judgment entered against him and the other defendants. Therefore, it is

ORDERED, that defendant Ruben's motion of April 29, 1989, to strike the plaintiff's opposition pleading be, and it is hereby, denied. It is

ORDERED FURTHER, that defendant Ruben's motion to vacate judgment be, and it is hereby, denied.

AND IT IS SO ORDERED.

/s/ Falcon B. Hawkins
Falcon B. Hawkins
Chief District Judge

Charleston, S.C.

July 17, 1990

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[2] Defendant Ruben moved to strike the plaintiff's opposition paper to the motion for relief from default on the ground that the pleading was not timely under Local Rule 12.06. In the interests of justice, the court will excuse strict compliance with the rule and consider the pleading.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HOME PORT RENTALS, INC., Plaintiff, vs. THE INTERNATIONAL YACHTING GROUP, INC,. A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS, Defendants.	CIVIL ACTION #2:88-1167-1
	ORDER
	(Filed Apr. 30, 1991)

On July 17, 1990, this court denied defendant Peter Ruben's ("Ruben") motion which sought relief from the October 31, 1988, default judgment entered against him and the other defendants in this case. On August 15, 1990, Ruben filed a motion for reconsideration of the July 17, 1990, order. Following association of new counsel, the court granted an extension of time to Ruben for the filing of further memorandums. On October 1, 1990, Ruben filed a supplemental memorandum regarding the default judgment.

On November 27, 1990, defendant Denny Allen ("Allen") filed a motion to vacate the default judgment. On November 30, 1990, this court had a hearing on these motions and took the matters under advisement to await further submissions from the parties. Having listened to

the argument and read the submissions of the parties, this matter is now ripe for decision.

The July 17, 1990, order denying relief from the default judgment emphasized several points, a number of which were anchored in statements made to the court by the defendants' former attorney, F. Mikell Harper ("Harper"). Harper said that he made "an exhaustive and diligent search" for his clients who were "fully aware" of the proceedings which, at that time, were leading to the default judgment. *See* Harper's August 2, 1988, motion and memorandum to withdraw as counsel for defendants. The implication from Harper was that his clients were seeking to evade the proceedings in this court.

However, in their effort to get relief from this default judgment, both defendants Allen and Ruben have said that Harper's statements were not true. Ruben and Allen maintain that justice has not been done. *See e.g.* Ruben's October 1, 1990, memorandum at 1 ("A fraud has been perpetuated on this Court.").

Early in this litigation, Allen contacted Harper to represent the defendants, and Allen himself said he was the one who primarily handled the correspondence with Harper. Affidavit of Denny Allen. In July 1987, Allen moved to Fuller, Texas. *Id.* At some point in the litigation, Allen does not say when, Harper told him that the plaintiff was willing to take a voluntary nonsuit. The parties agreed to that nonsuit, and the court entered that agreement on November 17, 1987. Although Allen was the person in charge of the litigation for the defendants, he apparently did not give a new address to his attorney in this matter when he moved to Texas. Jan Gibson, an

employee of Adventurent, successor to International Yachting, apparently forwarded Allen's business mail to him. *Id.* Gibson forwarded Harper's November 3, 1987, letter which advised that he, Harper, did not anticipate that the lawsuit would be reinstituted although the plaintiff could do so. Allen then relayed this information to Ruben in California. *Id.* Despite knowledge by both Denny and Allen that the lawsuit could be reinstituted and despite the fact that both defendants had moved to new addresses, neither defendant advised Harper of their current addresses. This defies common sense. It also suggests ulterior motives.

More recently, on January 17, 1991, Harper submitted an affidavit. *See* affidavit of F. Mikell Harper. According to his statement, Harper attempted to mail a letter to Allen, the person in charge of the litigation for the defendants, concerning the renewed suit. This letter went to Allen at International Yachting whose assets had been purchased by Adventurent in March 1986. Curiously, although mail addressed to Allen at this address was supposed to get to him, this letter did not. At this point, the representation to the court is that, apparently, the company would not accept a certified letter, the letter was returned unopened and no mention was made to Allen that delivery of a certified letter from his attorney had been attempted. Harper goes on to say that his secretary tried to call the defendant's office in Fort Lauderdale, Florida, but the person there was "generally uncooperative". This is the same office where, according to Allen's affidavit, Gibson would have either given Harper Allen's number in Texas or contacted Allen to say that he had been called by Harper.

One thing that the court does view differently now is Ruben's actions following his receipt of the default judgment. The record now shows that Ruben called his local attorney in California within days of getting the default order, and that Ruben faxed him a copy of the default judgment in order to get advice on how to proceed. *See* fax attached to affidavit of Paul A. Stewart. Ruben made this call only two and one half weeks after the court entered the order. His attorney in California then helped him retain Randall M. Chastain to work on the case in South Carolina. For a variety of reasons including a death in the family, Chastain put off the filing of the motion for relief for almost a year. The problem, of course, is that this flurry of activity on Ruben's part came after he and Allen had already neglected their responsibilities with this lawsuit in South Carolina.

As the Fourth Circuit has noted, "when the party is blameless and the attorney is at fault, the former interests control and a default judgment should ordinarily be set aside." *Augusta Fiberglass Coatings v. Fodor Contracting*, 843 F.2d 808, 811 (4th Cir. 1988) (court reversed the district court's refusal to grant relief from default judgment where the party was blameless and the attorney was at fault). However, it appears to the court that the defendants are at fault and, therefore are not entitled to relief under *Augusta Fiberglass*.

This court is both aware of and concerned about the competing interests here. On the one hand, there is the concern that matters be tried on their merits and not through default judgments. On the other, there is the concern for finality of judgments and that the litigants or their attorneys not misuse the system. This case troubles

the court. At this point, it appears that defendants Ruben and Allen, by making themselves unavailable, have created these default judgments. The court is persuaded that this default judgment should stand. In arriving at this decision, I have reviewed the entire file, and my previous orders are incorporated and made part of this order. Therefore, it is

ORDERED, that the defendant Ruben's motion to reconsider the July 17, 1990, decision to vacate the default judgment be, and it is hereby, denied. It is

ORDERED FURTHER, that defendant Allen's November 27, 1990, motion to vacate the default judgment be, and it is hereby, denied. It is

AND IT IS SO ORDERED.

/s/ Falcon B. Hawkins
Falcon B. Hawkins
Chief District Judge

Charleston, S.C.

April 25, 1991

A TRUE COPY
Attest Ann A. Birch, Clerk

By: /s/ illegible
Deputy Clerk

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

CASE TITLE
HOME PORT RENTALS, INC.

v.

THE INTERNATIONAL YACHTING GROUP, INC., a Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, and JIM EDWARDS

DISTRICT
SOUTH CAROLINA

DOCKET NUMBER
C/A2:88-1167-1

NAME OF JUDGE OR MAGISTRATE
HONORABLE FALCON B. HAWKINS

(Filed March 20, 1989)

___ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to ~~trial~~ or hearing before the Court with the judge ~~(magistr~~ate) named above presiding. The issues have been ~~tried~~ or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff, Home Port Rentals, Inc., recover of the defendants' The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards, the sum of One Million Two Hundred Thousand and no/100ths ($1,200,000.00) Dollars actual damages and fifty thousand and no/100th

$50,000.00 punitive damages with interest at the rate of 9.43% percent as provided by law, and their costs of action.

CLERK
ANN A. BIRCH

(BY) DEPUTY CLERK
/s/ Illegible

DATE
March 20, 1989

BELL, FLOYD, BELK & JERNIGAN

ATTORNEYS AT LAW

J. Howard Bell, III
Joel B. Floyd
Gene C. Belk
Rodney C. Jernigan

Sumter Offices
98 North Main Street
Post Office Box 400
Sumter, South Carolina 29151
(803) 778-6581

Florence Offices
One Evans Square
901 West Evans Street
Suite A
Post Office Box 2130
Florence, South Carolina 29503
(803) 669-8877

Reply To:
___ Sumter
✔ Florence

August 13, 1986

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Jim Edwards
302 Lewis Lane
Dania, Florida 33004

Re: Home Port Rentals, Inc. -vs- International Yachting Group, Inc., A Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards

Dear Mr. Edwards:

Upon receipt of this letter, I am herewith serving you with the enclosed Summons and Complaint that has been filed in the U.S. District Court, Charleston Division.

If you have any questions concerning these documents, please do not hesitate to contact our office.

With kindest regards,

Sincerely yours,

/s/ Daryl J. Corbin
Daryl J. Corbin

DJC:des

Enclosures

NOTE TO MR. HARPER -
SUMMONS's WERE RECEIVED FOR EACH NAMED COMPANY OR PERSON.
/s/ Toni Skoglund

9-18-86

Law Offices of Daryl J. Corbin
ATTORNEY AT LAW
227 WEST EVANS STREET
POST OFFICE BOX 447
FLORENCE, SOUTH CAROLINA 29503
803/667-6119

October 29, 1987

F. Mikell Harper, Esquire
P. O. Box 1121
Beaufort, SC 29902

Re: Home Port Rentals, Inc. v. The International Yachting Group, Inc., et al

Dear Mikell:

Please find enclosed the original Order providing for the voluntary non-suit of the above-captioned matter according to our agreement we made on October 29, 1987. Accordingly, please execute the Order and return it to me in the self-addressed, stamped envelope so I may forward it to the Court.

Furthermore, please make arrangements to forward the materials in the Home Port file as we agreed at your earliest convenience. Thank you; and, with warm regards, I am

Sincerely yours,

/s/ Daryl J. Corbin
Daryl J. Corbin

DJC:mms
Enclosure

LAW OFFICES
HARPER AND HARPER
F. MIKELL HARPER

FRAMPTON L. HARPER
OF COUNSEL

OFFICE:
1611 NORTH STREET • BEAUFORT, S.C. 29902
(803) 524-8595 P.O. BOX 1121

(803) 842-5243
HILTON HEAD ISLAND, S.C. 29938

November 3, 1987

Mr. Denny Allen
International Yachting Group
Siute [sic] 106
5450 Northwest 33rd Avenue
Fort Lauderdale, Florida 33309

RE: Home Port Rentals, Inc. v. International Yachting, et. al.

Dear Mr. Allen:

This is to advise you that the above referenced suit against International Yachting Group has been dismissed by the Federal Court. This dismissal is of the kind that McEachern does have the right to bring the suit again, but in all honesty, I do not expect that to happen. If it does, however, I will let you know and keep you posted on developments in this matter.

I am glad that so far, things seem to be going well, and that I believe that there is no further action on my part. Also, enclosed please find our bill for services rendered

in the matter. It was a pleasure working with you, and if you should need assistance in this or any other matter in the future, please do not hesitate to contact me.

Thanking you, and with best wishes, I am

Yours very truly,

F. Mikell Harper

FMH/jch
Enclosure

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Home Port Rentals, Inc., Plaintiff, vs. The International Yachging [sic] Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards, Defendants.	Civil Action No.: 2-86-2141-1 CONSENT ORDER (voluntary non-suit) (Filed Nov. 13, 1987)

This matter comes before the Court upon the consent of the parties to the above-captioned lawsuit involving a dispute between them with respect to an alleged franchise relationship. Accordingly, the parties agreed to resolve the pending action and seek approval of the Court of the following stipulations:

(1) The Plaintiff agrees to accept a voluntary non-suit without prejudice in this matter;

(2) The Defendants agree to submit themselves to the jurisdiction of the Court to resolve disputes arising between the parties, *provided that,* the Plaintiff institutes such proceedings no later than 180 days from the date of this Order;

(3) The Defendants further agree to waive and relinquish any statute of limitations defense

arising from the business relationship of the parties, *provided that*, the Plaintiff institutes such proceedings no later than 180 days from the date of this Order; and

(4) Counsel for the Defendants, F. Mikell Harper, Esquire, agrees to accept service of process on behalf of the above-named Defendants for legal proceedings instituted by the Plaintiff, *provided that*, the Plaintiff commences such proceedings no later than 180 days from the date of this Order.

IT IS THEREFORE ORDERED THAT:

(1) The Plaintiff shall be granted a voluntary non-suit without prejudice;

(2) The Court shall exert jurisdiction over the above-named parties arising from any action instituted by the Plaintiff, *provided that*, such proceedings are instituted no later than 180 days from the date of this Order;

(3) The above-named Defendants hereby waive and relinquish whatever statute of limitations defenses they may have had with respect to litigation between the parties, *provided that*, the Plaintiff commences such legal proceedings no later than 180 days from the date of this Order; and

(4) F. Mikell Harper, Esquire, attorney for the above-named Defendants, shall accept on behalf of such Defendants service of process arising from legal proceedings instituted by the Plaintiff, *provided that*, such proceedings are

commenced by the Plaintiff no later than 180 days from the date of this Order.

IT IS SO ORDERED.

/s/ Falcon B. Hawkins
The Honorable
Falcon B. Hawkins,
United States
District Judge
Charleston Division

Charleston, South Carolina

Novb. 4, 1987

WE SO CONSENT:

/s/ F. Mikell Harper
F. Mikell Harper

/s/ Daryl J. Corbin
Daryl J. Corbin

A TRUE COPY
Attest Ann A. Birch, Clerk

By Margaret King
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Home Port Rentals, Inc., Plaintiff, vs. The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards, Defendants.	CIVIL ACTION NO.: 2:88-1167-1 COMPLAINT (jury trial requested) (Filed MAY 4 1988)

The Plaintiff, complaining of the Defendants herein, would respectfully allege and show unto this Court as follows:

FOR A FIRST CAUSE OF ACTION

(Breach of Contract against Defendant International Yachting Group, Inc.)

1. Home Port Rentals, Inc. ("Home Port"), is a corporation organized and existing under the laws of the State of South Carolina; and The International Yachting Group, Inc. ("IYG"), is a corporation organized and existing under the laws of the State of Florida.

2. Plaintiff IYG is informed and believes that Defendants Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards are citizens and residents of the State of Florida.

3. This Court has jurisdiction pursuant to Title 28 §1332(a) in that the actions herein each exceed the sum or value of $10,000.00, exclusive of interest and costs; and such actions are between citizens of different states.

4. Venue in this matter is properly lain in the Court pursuant to Title 28 §1391 in that Plaintiff Home Port resides in this judicial district and this action is based upon diversity of citizenship.

5. On April 18, 1985, the Plaintiff and Defendant Yachting Group entered into two (2) purchase agreements. Under the first purchase agreement ("Engine Contract"), Defendant IYG sold the Plaintiff seven (7) fifteen (15) horsepower Johnson engines at $1,199.00 each, having a total purchase price of $8,393.00; and, accordingly, on April 18, 1985, the Plaintiff paid Defendant IYG the full purchase price of $8,393.00.

6. Under the second purchase agreement ("Boat Contract"), the Plaintiff bought numerous motorboats from Defendant IYG consisting of the following:

a. Three (3) Aquasport 250xF at $23,408.00 each;

b. Four (4) Aquasport 222 Walkthrough at $20,000.00 each;

c. Four (4) Aquasport 196 Osprey at $13,300.00 each; and

d. Ten (10) Aquasport 200 CCP at $15,342.00 each.

The total purchase price under the Boat Contract was $356,844.00; and, pursuant to the agreement, the purchase price was to include "all equipment and commissioning."

7. In accordance with the above-mentioned boat purchase, the Plaintiff paid Defendant Yachting Group a purchase deposit of $17,000.00.

8. Pursuant to §II(2) of the Boat Contract, Plaintiff Home Port paid Defendant IYG a $17,000.00 deposit refundable "in the event that Seller (IYG) . . . (was) unable to deliver the equipment (motorboats) prior to June 30, 1985. In such case, the Buyer ('Home Port') shall have the option of cancelling this agreement."

9. Defendant IYG breached the Engine Contract through non-deliverance of proper bills of sale in a punctual manner thus rendering such engines effectively useless and non-transferrable [sic]. Furthermore, Defendant Yachting Group breached the Boat Contract through its failure to deliver such Aquasports to the Plaintiff prior to June 30, 1985. Despite the Plaintiff's numerous requests and pleas, Defendant Yachting Group refused or recklessly failed to deliver to the Plaintiff appropriate documentation with respect to the Johnson engines or return the $17,000.00 Aquasport purchase deposit.

10. As a proximate result of Defendant Yachting Group's breaches of contract, Plaintiff Home Port has and will continue to suffer from lost business opportunities, diminished goodwill, reduced rental income and revenue, and other harms and damages. The Plaintiff is informed and believes that such consequences were reasonably foreseeable and naturally arose from Defendant Yachting Group's breach of the parties' contract.

WHEREFORE, Home Port Rentals, Inc., under the First Cause of Action, prays that this Court order Defendant IYG to compensate the Plaintiff in the maximum

sum of damages proved at trial; an adequate sum of costs and expenses incurred in prosecuting with this action, including a reasonable amount of attorney's fees and court costs; and grant other and further relief as the Court deems just and proper.

FOR A SECOND CAUSE OF ACTION

(common law fraud)

11. Plaintiff Home Port reavers each allegation under the First Cause of Action as if repeated verbatim herein and alleges as follows:

12. On or about April 18, 1985, Defendant IYG sold Plaintiff Home Port a "Club Nautico" investment concept under which Defendant IYG would provide the Plaintiff with a motorboat leasing program, promotional support, specialized training of personnel, uniforms and supplies, and other matters.

13. As a material inducement causing Plaintiff Home Port to purchase the "Club Nautico" concept, Defendant IYG, through its officers, representatives, employees, or agents, uttered several misrepresentations and misleading statements to Plaintiff Home Port, including, but not limited to, the following:

(a) Defendant IYG and its agents told Plaintiff Home Port that a reasonable amount of average monthly profits following purchase of the "Club Nautico" investment would approximate $20,000.00; whereas, subsequent to such investment, Plaintiff Home Port has lost substantial funds in excess of $200,000.00;

(b) Defendant IYG and its agents told Plaintiff Home Port that, upon purchase of the "Club Nautico" investment, a fleet of fully equipped, properly commissioned motorboats would be delivered to the Plaintiff on or before June 15, 1985, in sufficient time for the busiest portion of the boating season; whereas, Defendant IYG never delivered such complete fleet of motorboats to Plaintiff Home Port; and those boats sent by Defendant IYG were late and defective causing Plaintiff Home Port to lose substantial revenues during the boating season;

(c) Defendant IYG and its agents told Plaintiff Home Port that "Club Nautico" motorboats and equipments would be competively priced compared to those prices charged by local merchants for same or similar merchandise; whereas, upon being bound to purchase "Club Nautico" motorboats and equipments, Plaintiff Home Port learned that Defendant IYG prices were generally noncompetitive and "Club Nautico" equipment and merchandise were of inferior quality excessively priced; and

(c) Defendant IYG and its agents told Plaintiff Home Port that, upon purchase of the "Club Nautico" investment, Plaintiff Home Port would be authorized to purchase at wholesale prices and sell to the general public Outboard Marine Corporation motorboats and products as an authorized dealer; whereas, subsequent to such investment, Plaintiff Home Port was denied authorization to conduct such purchases

and sales as an Outboard Marine Corporation dealer.

14. As a result of such false and misleading statements of Defendant IYG, Plaintiff Home Port was induced into purchasing the "Club Nautico" concept at a price of $90,000.00.

15. Plaintiff Home Port is informed and believes that its reliance on Defendant IYG's false and misleading statements under PARAGRAPH THIRTEEN (13) above was reasonable; that Plaintiff Home Port was unaware of the falsity of such statements uttered by Defendant IYG; and that Defendant IYG knew or should have known that such statements were false and misleading and that Plaintiff Home Port would rely upon such false and misleading statements.

16. As a proximate result of Plaintiff Home Port's justifiable reliance upon Defendant IYG's false and misleading statements, Defendant IYG, Plaintiff Home Port has incurred and will continue to suffer from substantial financial harms and injuries including, but not limited to, lost business opportunities and revenues, wasted corporate assets, reduced goodwill, reputational injuries, and other financial damages and harms.

17. The Plaintiff is informed and believes that due to the wanton, reckless, intentional or grossly negligent conduct on behalf of Defendant Yachting Group, this Court would be justified in issuing its Order granting the Plaintiff an appropriate sum of punitive damages.

WHEREFORE, Plaintiff Home Port, under the Second Cause of Action, prays that this Court order Defendant IYG to compensate it in the full amount of damages

proved at trial; an appropriate amount of court costs and expenses incurred in prosecuting this action, including a reasonable sum of attorney's fees; a proper sum of punitive damages, and other and further relief as this Court deems just and appropriate.

FOR A THIRD CAUSE OF ACTION

(securities violations)

18. Plaintiff Home Port reavers each allegation under the First and Second Causes of Action as if repeated *verbatim* herein and further alleges as follows:

19. The Plaintiff is informed and believes that each of the Defendants constitute a "person" as such term is defined under §35-1-20(7) of the *South Carolina Code of Laws, 1976,* ("Code").

20. The Plaintiff is informed and believes that the Franchise Agreement constitutes a "security as such term is defined under §31-1-20(12) of the *Code.*

21. Plaintiff Home port is informed and believes that Defendants Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards each constitute an "agent" as such term is defined under §35-1-20(2) of the *Code.*

22. The Defendants in offering to sell the "Club Nautico" investment to Plaintiff Home Port sold such security by means of untrue statements of material facts; and such statements include, but are not limited to, the following:

(a) Defendant IYG and its agents told Plaintiff Home Port that a reasonable amount of average monthly profits following purchase

of the "Club Nautico" investment would approximate $20,000.00; whereas, subsequent to such investment, Plaintiff Home Port has lost substantial funds in excess of $200,000.00;

(b) Defendant IYG and its agents told Plaintiff Home Port that, upon purchase of the "Club Nautico" investment, a fleet of fully equipped, properly commissioned motorboats would be delivered to the Plaintiff on or before June 15, 1985, in sufficient time for the busiest portion of the boating season; whereas, Defendant IYG never delivered such complete fleet of motorboats to Plaintiff Home Port; and those boats sent by Defendant IYG were late and defective causing Plaintiff Home Port to lose substantial revenues during the boating season;

(c) Defendant IYG and its agents told Plaintiff Home Port that "Club Nautico" motorboats and equipments would be competively priced compared to those prices charged by local merchants for same or similar merchandise; whereas, upon being bound to purchase "Club Nautico" motorboats and equipments, Plaintiff Home Port learned that Defendant IYG prices were generally noncompetitive and "Club Nautico" equipment and merchandise were of inferior quality excessively priced; and

(c) Defendant IYG and its agents told Plaintiff Home Port that, upon purchase of the "Club Nautico" investment, Plaintiff Home Port would be authorized to purchase at wholesale prices and sell to the general

public Outboard Marine Corporation motorboats and products as an authorized dealer; whereas, subsequent to such investment, Plaintiff Home Port was denied authorization to conduct such purchases and sales as an Outboard Marine Corporation dealer.

23. Plaintiff Home Port is informed and believes that such conduct on behalf of Defendant IYG and its agents under PARAGRAPH TWENTY-TWO (22) above constitutes a violation of §35-2-1210 of the *Code*.

24. Upon further information and belief, Plaintiff Home Port alleges that such conduct on behalf of Defendant IYG and its agents under PARAGRAPH TWENTY-TWO (22) above constitutes a violation of §35-1-1490(2) of the *Code*.

25. Moreover, Defendants Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards during all relevant times herein, were partners, officers, or directors of Defendant IYG; and, such Defendants materially aided in the sale of the "Club Nautico" investment to Plaintiff Home Port in violation of §35-1-1500 of the *Code*; and, accordingly, such Defendant IYG to Plaintiff Home Port for all applicable damagaes [sic] under the Third Cause of Action.

WHEREFORE, Plaintiff Home Port prays this Court order the Defendants, jointly and severally, to compensate it in the sum of all consideration paid and costs naturally arising under the "Club Nautico" investment, together with interest at six (6) percent per year from the date of investment; award an additional sum of costs and expenses incurred in prosecuting this action including a

reasonable amount of attorney's fees; and grant other and further relief as this Court deems just and appropriate.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF DARYL J. CORBIN
227 West Evans Street
P. O. Box 447
Florence, South Carolina 29503
(803) 667-6119

Florence, South Carolina

May 4, 1988

BY: /s/ Daryl J. Corbin
Daryl J. Corbin
ATTORNEY FOR PLAINTIFF

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Home Port Rentals, Inc., Plaintiff, vs. The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards, Defendants.	CIVIL ACTION NO.: 2:88-1167-1 PLAINTIFF'S ANSWERS TO 16(b) INTERROGATORIES (Filed May 4, 1998)

1. State with particularity what you contend the Defendant did, or failed to do, which entitled you to obtain the relief you seek in this action.

ANSWER: Defendant, The International Yachting Group, Inc., ("IYG"), sold to Plaintiff Home Port Rentals, Inc. ("Home Port"), a "Club Nautico" investment under which the Plaintiff bought and/leased motorboats and other marine equipment under the promise that the Plaintiff take an average monthly net profit of $20,000.00 upon paying Defendant IYG, $90,000.00 for a franchise, and several thousands of dollars for motorboats or leases, Defendant IYG, failed to deliver the motorboats in a timely fashion and caused Plaintiff Home Port, to lose a substantial amount of funds during the busiest part of the boating season. Further, upon finally receiving some of the promised motorboats several months late, Plaintiff

Home Port, found the vessels to be improperly equipped, unsafe, mechanically unsound, and of inferior quality. Moreover, the costs of such motorboats were excessive in contradiction of Defendant IYG's, promises of wholesale and competitive prices. As a result of delinquent and partial deliveries, as well as continuous mechanical problems with such motorboats, Plaintiff Home Port, lost business revenues, customers, good will, and substantial funds; and Defendant IYG's contractual failures to ship marine products to Plaintiff Home Port, as promised and such late or inadequate performance of the parties' agreement caused Plaintiff Home Port, to lose approximately $200,000.00. Accordingly, Plaintiff Home Port, has initiated this action under the legal theories of breach of contract, fraudulent misrepresentation, and violations of the South Carolina Uniform Securities Act.

2. Describe in detail all laws, acts having the force and effect of law, codes, regulations and legal principles, standards, and customs or usages, which you contend are applicable to this action.

ANSWER: Under the First Cause of Action, Plaintiff Home Port, relies upon general laws and principles of contracts in conjuction [sic] with applicable case law. The Second Cause of Action is brought under the legal theories of common law fraud and misrepresentation and, accordingly, the Plaintiff would rely upon appropriate case law and principles in prosecuting such laws of action. Pursuant to the Third Cause of Action, the Plaintiff seeks relief under the §35-1-1490(2) and 35-1-1220 of the South Carolina Uniform Securities Act. Accordingly, under §§35-1-1220 and 35-1-1490 (2), any person who has incurred damages as a result of the sale of a security

through false and misleading statements may seek compensation in the sum of all consideration paid such security interest accruing from the date of investment as six (6%) percent per year, and costs, including a reasonable sum of attorney's fees, associated with prosecution of such action.

3. State the full names, addresses, telephone numbers of all lay witnesses whose testimony you may use at the trial of this case and describe the issues to which the testimony will relate.

ANSWER: (a) Michael McEachern
P. O. Box 5333
Beaufort, SC 29901
(803) 838-5158

(c) David Gressette
P. O. Box 5333
Beaufort, SC 29901
(803) 838-5158

(d) Robert Brunson
P. O. Box 5333
Beaufort, SC 29901
(803) 838-5158

The testimony of each of the above-named witnesses will relate to false and misleading statements made by representatives of Defendant IYG, with respect to the "Club Nautico" investment as alleged under the Complaint. Furthermore, each witness will testify about damages in this matter.

4. Identify by full name, address and telephone number each person whom you expect to call as an expert witness at the trial of this case, and, as to each expert identified, state the subject matter on which he is expected to testify,

the substance of the facts and opinions to which he is expected to testify, and a summary of the grounds for each opinion.

ANSWER: An expert witness has not been retained to testify in this case.

5. If you contend that you have been injured or damaged, describe said injuries and damages in detail and list the elements of damages for which you contend you are entitled to recover and the measure by which you contend the same should be computed.

ANSWER: The Plaintiff Home Port's investment, "Club Nautico", approximates $200,000.00; and such investments have been virtually wasted. Under the Uniform Securities Act, the Plaintiff has requested complete return of funds invested in "Club Nautico", plus interest at the rate of six (6%) percent per year, in costs, including a reasonable sum of attorney's fees. The Plaintiff also seeks punitive damages under the Second Cause of Action based upon the legal theories of common law fraud and misrepresentation. Such measure of punitive damages in this matter rests upon the discretion of the Court. The measure of damages under the First Cause of Action consists of general contract damages, including injuries naturally arising from the Defendant's breach of the parties' contract.

6. State the full name, address and telephone number of all persons or legal entities who have a subrogation interest in the cause of action set forth in your complaint, and state the basis and extent of said interest.

ANSWER: N/A

7. Outline in detail the discovery you anticipated you will pursue in this case and state the time you estimate it will take you to complete each item of same, along with an explanation of how you compute said times.

ANSWER: Plaintiff Home Port, would take discovery depositions of the Defendants, some agents of the Defendants, and some other investors in "Club Nautico". The Plaintiff would anticipate having to travel the state of Florida to obtain such discovery. Furthermore, Plaintiff Home Port, would serve the Defendants with Interrogatories and Requests for Admissions in this case. Moreover, Plaintiff Home Port, anticipates serving appropriate Motions to Inspect and Produce corporate documents in possession of the Defendants. Accordingly, based upon complete, prompt cooperation of the Defendants, Plaintiff Home Port, would estimate that such discovery would require approximately 120 days to complete.

8. Do you wish for this case to be tried jury or nonjury?

ANSWER: Plaintiff Home Port would request a jury trial in this case.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF DARYL J. CORBIN
227 West Evans Street
P. O. Box 447
Florence, South Carolina 29503
(803) 667-6119

BY: Daryl J. Corbin
Daryl J. Corbin
ATTORNEY FOR PLAINTIFF

Florence, South Carolina

May 4, 1988

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF FLORENCE)

PERSONALLY appeared before me, Daryl J. Corbin, on behalf of Mike McEachern, who, being duly sworn, deposes and says that Mike McEachern is the President of Plaintiff Home Port Rentals, Inc., in the above action; that Mike McEachern has read the foregoing Answers to Rule 16(b) Interrogatories, which are true of his own knowledge, except those matters therein stated upon information and belief; and, as to those, Mike McEachern believes them to be true.

/s/ Daryl J. Corbin
Daryl J. Corbin,
on behalf of
Mike McEachern,
President of
Home Port Rentals, Inc.

SWORN to before me this

4th day of May, 1988.

/s/ Martha M. Illegible
Notary Public for South Carolina

My Commission Expires: 8-17-89

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Home Port Rentals, Inc., Plaintiff, vs. The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards, Defendants.	CIVIL ACTION NO.: 2:88-1167-1 AFFIDAVIT OF PERSONAL SERVICE (Filed May 13, 1988)

Personally appeared before me, Joseph E. Brown, Jr., who, being first duly sworn, deposes and states that he served the following Summons, Complaint and Plaintiff's Answers to 16(b) Interrogatories in this action, by delivering same to F. Mikell Harper, Esquire, who accepted such service on behalf of The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards and leaving with him personally one (1) copy of same at 1611 North Street, Beaufort, South Carolina, on the 4th day of May, 1988, at 4:32 p.m.; and the Deponent is not a party to nor interested in this action.

SWORN to before me this

11th day of May, 1988.

/s/ Joseph E. Brown, Jr.
Joseph E. Brown, Jr.

/s/ Martha M. Illegible
Notary Public for South Carolina

My Commission Expires: 8-17-89

LAW OFFICES
HARPER AND HARPER

F. MIKELL HARPER

FRAMPTON L. HARPER
OF COUNSEL

OFFICE:

1611 NORTH STREET • BEAUFORT, S. C. 29902

(803) 524-8595 P.O. BOX 1121

FAX (803) 524-1959

(803) 842-5243

HILTON HEAD ISLAND, S.C. 29938

May 25, 1988

Mr. Denny Allen
International Yachting Group
5450 Northwest 33rd Avenue
Suite 106
Fort Lauderdale, Florida 33309

RE: Home Port Rentals, Inc. v. International Yachting Group, Inc., et al.
CA NO 2: 88-1167-1

Dear Denny:

Enclosed please find copies of the Complaint, and of the Answer, Counterclaim, Notice of Motion and Memorandum in the above referenced which we have filed in your behalf. Please call me immediately and give me your new address and phone number.

Yours very truly,

/s/ F. Mikell Harper
F. Mikell Harper
FMH/jch
enclosures

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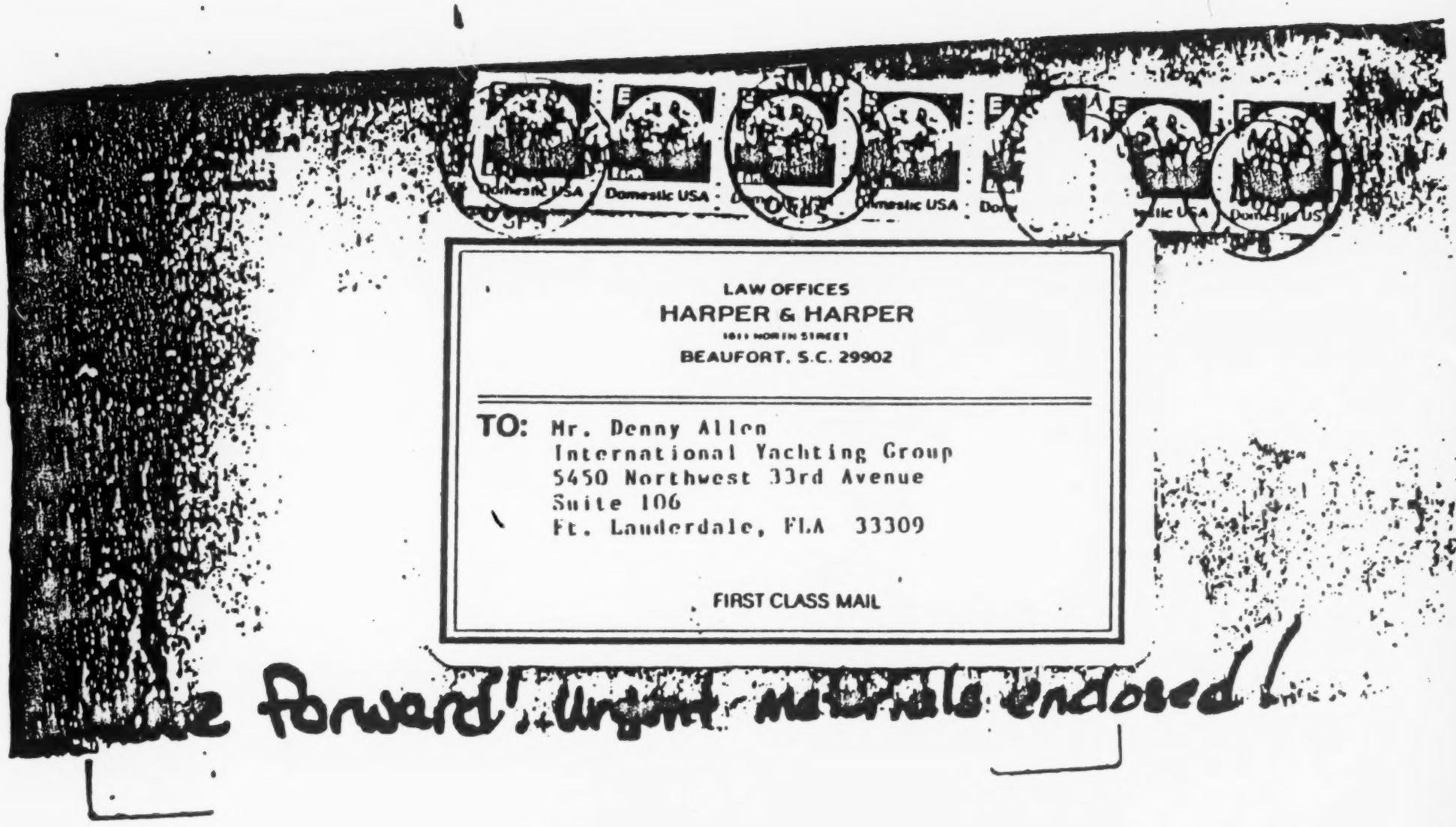

LAW OFFICES
HARPER & HARPER
1611 NORTH STREET
BEAUFORT, S.C. 29902

TO: Mr. Denny Allen
International Yachting Group
5450 Northwest 33rd Avenue
Suite 106
Ft. Lauderdale, FLA 33309

FIRST CLASS MAIL

Please forward! Urgent - Materials enclosed!

BEST AVAILABLE COPY

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HOME PORT RENTALS, INC., Plaintiff, vs. THE INTERNATIONAL YACHTING GROUP, INC., A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS. Defendants.	CA NO.: 2:88-1167-1 NOTICE OF MOTION AND MOTION TO WITHDRAW APPEARANCE (Filed Aug. 2, 1988)

YOU WILL PLEASE TAKE NOTICE that F. Mikell Harper, attorney for the Defendants will move before this Honorable Court as soon as counsel may be heard, for an Order of Withdrawal of Appearance pursuant to Rule 2.07 of the Local Rules of the United States District Court. The grounds for said motion are more fully set forth in the Memorandum in Support of Notice of Motion and Motion to Withdraw Appearance filed contemporaneous herewith.

HARPER & HARPER

/s/ F. Mikell Harper
F. Mikell Harper
Attorney for Defendants
Post Office Box 1121
Beaufort, South Carolina 29901
(803) 524-8595

August 1 , 1988

IN THE DISTRICT COURT OF THE UNITED STATES

DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HOME PORT RENTALS, INC.,	CA NO.: 2:88-1167-1
Plaintiff,	MEMORANDUM IN SUPPORT OF NOTICE OF MOTION AND MOTION TO WITHDRAW APPEARANCE
vs.	
THE INTERNATIONAL YACHTING GROUP, INC., A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS.	(Filed Aug. 2, 1988)
Defendants.	

F. Mikell Harper, attorney for Defendants moves to withdraw his appearance as attorney for Defendants pursuant to Rule 2.07 of the Local Rules for the United States District Court. The following are the grounds for the motion:

1. That, pursuant to Consent Order filed November 4, 1987. F. Mikell Harper agreed to accept service for the Defendants, and Defendants were fully aware of said Consent Order and the fact that a new proceeding was being instituted in said court.

2. That the whereabouts of Defendants The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore and Jim Edwards are unknown and that Attorney for Defendants has made an exhaustive and diligent search for Defendants.

3. Attorney for Defendants submits that Defendants are unwilling or unable to cooperate or to contact F. Mikell Harper concerning the defense of this action.

CONCLUSION

For the reasons set forth above, F. Mikell Harper respectfully requests the court for an Order Withdrawing Counsel and relieving him of his duties as attorney for Defendants.

HARPER & HARPER

/s/ F. Mikell Harper
F. Mikell Harper
Attorney for Defendants
Post Office Box 1121
Beaufort, South Carolina 29901
(803) 524-8595

August 1 , 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HOME PORT RENTALS, INC., PLAINTIFF, VS. THE INTERNATIONAL YACHTING GROUP, INC., ETC., ET AL, DEFENDANTS.	CIVIL ACTION NO. 2:88-1167-1 CHARLESTON, SOUTH CAROLINA THURSDAY, AUGUST 25, 1988 2:58 P.M.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE FALCON B. HAWKINS
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR THE PLAINTIFF:	DARYL J. CORBIN, ESQ. POST OFFICE BOX 447 FLORENCE, SOUTH CAROLINA 29503
FOR THE DEFENDANTS:	F. MIKELL HARPER, ESQ. POST OFFICE BOX 1121 BEAUFORT, SOUTH CAROLINA 29902
COURT REPORTER:	LAVON E. DENIG, RPR-CM OFFICIAL COURT REPORTER POST OFFICE BOX 835

CHARLESTON, SOUTH
CAROLINA 29402
(803) 577-7301

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUER AIDED TRANSCRIPTION.

[p. 2.] THURSDAY AFTERNOON SESSION
AUGUST 25, 1988

THE COURT: I HOPE THAT YOU GENTLEMEN DON'T THINK THAT THIS WAS A WASTED EFFORT COMING DOWN HERE AND UP HERE TODAY, BUT BECAUSE OF THE NATURE OF THESE PLEADINGS, I THINK IT'S BETTER THAT WE MAKE SOME SORT OF A RECORD.

MR. HARPER, ARE YOU STILL TRYING TO GET YOURSELF RELIEVED FROM COUNSEL IN THIS CASE?

MR. HARPER: YES, SIR, YOUR HONOR. I HAVE TRIED AS EARLY AS TODAY TO STILL TRY TO LOCATE THESE PEOPLE, AND I HAVE BEEN UNABLE TO DO SO.

THE COURT: WHY DON'T YOU TELL US FOR THE RECORD BRIEFLY HOW THEY LOST CONTACT WITH YOU OR YOU LOST CONTACT WITH THEM, JUST SO THAT WE HAVE SOME SORT OF A RECORD.

MR. HARPER: ALL RIGHT. YOUR HONOR, THIS CASE WAS INSTITUTED ORIGINALLY ABOUT A YEAR-AND-A-HALF AGO BY MR. CORBIN ON

BEHALF OF HIS CLIENT AGAINST THESE DEFENDANTS. ONE OF THESE DEFENDANTS, A MR. DENNY ALLEN, CAME TO MY OFFICE IN BEAUFORT FROM FLORIDA AND DISCUSSED THIS MATTER WITH ME AT LENGTH AND BROUGHT THE PLEADINGS WITH HIM, AND AT THAT TIME I AGREED TO REPRESENT THE DEFENDANTS IN THIS MATTER. AND HE PAID ME A SUBSTANTIAL DEPOSIT.

SHORTLY THEREAFTER, THAT DEPOSIT CHECK WAS RETURNED, INSUFFICIENT FUNDS.

[p. 3] AFTER SOME CONTACT WITH HIM FOR A PERIOD OF TWO OR THREE WEEKS, THE CHECK WAS MADE GOOD, AND I DID RECEIVE THAT DEPOSIT.

I UNDERTOOK TO REPRESENT THEM IN THAT FIRST ACTION, AND IT RESULTED, AFTER NUMEROUS PLEADINGS AND MOTIONS, IT RESULTED IN AN AGREEMENT WHEREIN THE PLAINTIFF DISMISSED THIS ACTION WITH LEAVE TO BRING IT AGAIN WITHIN 180 DAYS, AS YOUR HONOR IS WELL AWARE.

I MAILED THOSE PLEADINGS OR THAT ORDER, THAT CONSENT ORDER TO MR. ALLEN, AND TOGETHER WITH A LETTER EXPLAINING TO HIM THAT THIS MATTER WAS ENDED. THEY DID HAVE LEAVE TO BRING IT AGAIN WITHIN 180 DAYS.

I CONSIDERED THAT MY REPRESENTATION OF HIM HAD BEEN COMPLETED AT THAT POINT, AND THAT WE WERE ON AN EVEN BASIS, AND THAT WAS THAT.

THAT LETTER WAS NOT RETURNED. I HAD AN ADDRESS THERE, AND THAT LETTER WAS NOT RETURNED. IT WAS NOT SENT CERTIFIED MAIL.

THEREAFTER, ON THE 180TH DAY, MR. CORBIN AGAIN BROUGHT THIS ACTION AND DROVE TO BEAUFORT AND SERVED ME IN MY OFFICE WITH THESE ADDITIONAL PLEADINGS.

AT THAT TIME I FORWARDED THESE PLEADINGS BY REGISTERED MAIL TO THE ADDRESS THAT WAS GIVEN TO ME, AND IT WAS RETURNED WITH A NOTATION THAT THEY WERE NO LONGER AT THIS ADDRESS, AND THE WHEREABOUTS WERE UNKNOWN.

[p. 4] NOW, THE ADDRESS THAT I SENT IT TO IS TO A CORPORATION CALLED ADVENTURE RENT, WHICH IS NOT A PARTY TO THIS ACTION. HOWEVER, ADVENTURE RENT IS A DEFENDANT IN A LAWSUIT BROUGHT BY MR. CORBIN'S CLIENT IN STATE COURT OF BEAUFORT COUNTY, ARISING OUT OF THE SAME OR SIMILAR CIRCUMSTANCES SURROUNDING THIS ACTION. I DO NOT REPRESENT THEM IN THAT ACTION. MR. PARKER BARNES IN BEAUFORT REPRESENTS THEM IN THAT ACTION.

THEY HAVE TAKEN THE POSITION THAT THEY HAVE NO DUTY TO DEFEND THIS MATTER OR THESE DEFENDANTS, AND THAT THEY DO NOT INTEND TO DO SO. AND I HAVE DISCUSSED THAT WITH MR. BARNES.

I HAVE TRIED TO FIND THESE DEFENDANTS, ADVENTURE RENT, OR ITS OFFICES, DO NOT KNOW

THEIR WHEREABOUTS. THEY HAVE NOT TOLD ME THEIR WHEREABOUTS UPON INQUIRY.

THEREFORE, I FEEL LIKE AND THAT'S THE BASIS OF MY MOTION NOW IS THE FACT THAT I DID PERFORM PURSUANT TO THE TERMS OF THE ORIGINAL RETAINER AGREEMENT, THAT THIS IS A NEW ACTION, THAT I FILED THESE PLEADINGS TO PROTECT THE INTERESTS OF THESE DEFENDANTS UNTIL SUCH TIME AS I COULD GET THIS MATTER RESOLVED, AND THAT RESULTS IN THIS MOTION THAT WE ARE HERE TODAY ABOUT.

THE COURT: SO FAR AS YOU KNOW, THESE DEFENDANTS HAVE NEVER ANSWERED OR COUNTERCLAIMED, THAT YOU DID IT ON THEIR BEHALF, IS THAT RIGHT?

MR. HARPER: YES, SIR. I DID IT TO PROTECT – I FELT [p. 5] I HAD A DUTY TO DO SO.

THE COURT: I'M THINKING YOU HAD AN OBLIGATION, TOO. BUT THEY HAVE NEVER ACKNOWLEDGED THAT FACT, BUT YOU DON'T KNOW THAT THEY HAVE EVER BEEN MADE AWARE OF THIS 180 DAY COMPLAINT.

MR. HARPER: OTHER THAN THE FACT THAT I MAILED THE ORIGINAL ORDER –

THE COURT: WHICH IT DIDN'T COME BACK.

MR. HARPER: NO, SIR.

THE COURT: I MEAN THEY DON'T KNOW THAT HE, IN FACT, AT THE END OF THE 180 DAYS FILED THE NEW SUIT.

MR. HARPER: TO MY KNOWLEDGE, NO, SIR. I HAVE NO WAY OF KNOWING THAT, NO, SIR.

THE COURT: ALL RIGHT.

MR. CORBIN: YOUR HONOR, IF I MAY.

THE REASON WHY THE ACTION WAS NOT BROUGHT TO TRIAL IN NOVEMBER OF LAST YEAR WAS BECAUSE, AND I CAN UNDERSTAND MIKE'S PROBLEMS, HE WAS HAVING DIFFICULTY GETTING HIS CLIENTS HERE TO PARTICIPATE IN THE TRIAL. AS AN ACCOMMODATION TO MR. HARPER AS WELL AS HIS CLIENTS, PLUS IN RESPONSE TO HIS MOTIONS TO DISMISS, WE CAME UP WITH A VOLUNTARY NONSUIT, PROVIDED THAT THE ISSUE WOULD NOT BE RAISED, THE COMPLAINT COULD BE REBROUGHT AND TO AVOID ANY SERVICE PROBLEMS, WHICH I SUSPECT WE MAY HAVE, THEY AGREED TO LET THEIR ATTORNEY ACCEPT SERVICE IN BEAUFORT.

WE HAVE DONE EVERYTHING THE COURT HAS ASKED US TO DO [p. 6] PURSUANT TO THE CONSENT ORDER, AND IT IS OUR POSITION THAT, IN FACT, THEY HAVE BEEN SERVED IN THIS MATTER.

THE COURT: WELL, ONE REASON I WANTED TO HAVE THIS STATUS CONFERENCE, OR WHATEVER WE WANT TO CALL IT, IT DOESN'T MAKE A LOT OF DIFFERENCE FOR ME, BUT I HATE FOR YOU-ALL TO GO THROUGH A LOT OF USELESS

MOTIONS. IF, IN FACT, IT'S SUCH AS YOU SAY, AND THEY HAVE BEEN SERVED, AND THEY HAVE ANSWERED, THEN I GUESS THAT I COULD RELIEVE MR. –

MR. HARPER: YOUR HONOR, MAY I PROPOSE A SOLUTION?

THE COURT: WELL, LET ME HEAR IT.

MR. HARPER: YOUR HONOR, AND I HAVEN'T DISCUSSED THIS WITH MR. CORBIN, BUT PERHAPS AS I SAID EARLIER, THERE IS AN ACTION IN STATE COURT AGAINST A COMPANY CALLED ADVENTURE RENT, WHICH, ALTHOUGH NOT A COMPANION CASE, HAS SOME BEARING ON THIS MATTER.

I WOULD PROPOSE THAT A CONSENT ORDER UNDER RULE 43(C) IN FEDERAL COURT BE ENTERED UP FOR PERHAPS A PERIOD OF ONE YEAR, OR SOMETHING LIKE THAT, AND THEN AT THAT TIME IF NOTHING HAPPENS, AND MR. CORBIN WANTS TO RESTORE, THEN WE COULD RECONSIDER THIS MOTION OF MINE AND AT THE SAME TIME MAYBE THE COURT WOULD HAVE THE BENEFIT OF SOME ADDITIONAL DEVELOPMENTS, WHICH WOULD OCCUR. AS I SAID, I HAVEN'T TALKED WITH MR. CORBIN ABOUT THAT.

MR. CORBIN: YOUR HONOR, OF COURSE, WE WOULDN'T CONSENT TO THAT. OUR CLIENTS ARE PREPARED TO TRY THE CASE. WE [p. 7] WERE PREPARED LAST NOVEMBER. WE WOULD LIKE TO

GET SOME RELIEF FROM THE PLAINTIFFS IN THIS MATTER.

THE COURT: WELL, THE ONLY OTHER THING I WOULD SUGGEST, AND WHAT I WAS ABOUT TO SUGGEST IS IF SOME WAY OR OTHER WE GET THE LAST KNOWN ADDRESS AND THROUGH SOME PUBLICATION FILE SOME RULE TO SHOW CAUSE WHY THEY SHOULDN'T BE IN DEFAULT IN THE MATTER, AND HEARING NOTHING, THEN PUT THEM IN DEFAULT AND MOVE ALONG WITH THE CASE. I WOULD RELIEVE – I GUESS IN THE RULE, WE WOULD HAVE TO SHOW THAT MR. – THAT MR. HARPER, AS A COURTESY, AND WHATEVER THE PROPER WORDS WOULD BE TO THEM, DID ACCEPT SERVICE AND DID FILE THESE PLEADINGS, BUT THAT HE NO LONGER WISHES TO REPRESENT THEM, AND THAT I GUESS IN THE RULE TO SHOW CAUSE WHY THEY SHOULDN'T BE IN DEFAULT AS TO WHY HE SHOULDN'T BE RELIEVED AS COUNSEL. AND IF WE DON'T HEAR ANYTHING, THEN WE RELIEVE HIM AND PROCEED ON AGAINST THEM.

I GATHER FROM JUST THE WAY MR. HARPER IS TALKING AND YOU, THAT THERE MUST BE SOME CONNECTION, AND MAYBE I KNEW WHAT IT WAS AT ONE TIME, BETWEEN THE PRESENT CASE AND THE STATE COURT AND THIS CASE SO FAR AS THE PARTIES ARE CONCERNED?

MR. CORBIN: YOUR HONOR, THERE'S ONLY A SLIGHT CONNECTION WHICH THE PARTY IN THE STATE COURT ACTION DENIES AT THIS POINT.

WHAT HAPPENED, THESE PEOPLE BOUGHT OUT, THE DEFENDANT IN THIS CASE, THEY ARE DENYING THEY ASSUMED ANY LIABILITY WITH RESPECT TO THAT PURCHASE OF ASSETS.

[p. 8] THE COURT: I GUESS WHAT I AM TRYING TO SAY IS, AND, OF COURSE, THAT'S A DIFFERENT MATTER, BUT THERE MAY BE SOME CONNECTIONS BETWEEN THOSE PARTIES AND THAT MAYBE THOSE PARTIES IN DEFENDING IN THE BEAUFORT CASE MIGHT EVEN KNOW THE WHEREABOUTS OF SOME OF THESE.

MR. CORBIN: I SUSPECT THERE MAY HAVE BEEN COMMUNICATIONS BETWEEN THE DEFENDANTS IN THAT ACTION AND THIS.

THE COURT: I DON'T KNOW WHAT WE CAN DO ABOUT THAT, WHETHER IT IS OR IT ISN'T, BECAUSE IT IS NOT AT LEAST MY FUNCTION TO GO AROUND FINDING PARTIES. THAT'S SOMEBODY ELSE'S I GUESS.

MR. HARPER: YOUR HONOR, MAY I MAKE ANOTHER SUGGESTION TO YOU, AGAIN I HAVEN'T TALKED TO MR. CORBIN, IS THAT THIS RULE TO SHOW CAUSE NOT TO BE TO HOLD THEM IN DEFAULT. I WOULD LIKE TO LEAVE MY PLEADINGS HERE AND PROCEED, JUST GET RELIEVED OF COUNSEL AND LET NATURE TAKE ITS COURSE IN THE NORMAL COURSE OF CALLING THE CASE FOR TRIAL AND MOTIONS, AND SO FORTH, AND GO FROM THAT POINT. I WOULD HESITATE, AND I AM NOT ASKING THE COURT TO WITHDRAW MY PLEADINGS IN ORDER TO PUT THEM IN DEFAULT.

THE COURT: I WASN'T NECESSARILY GOING TO WITHDRAW YOUR PLEADINGS. I WAS GOING TO LEAVE IT LIKE IT WAS, BUT WHETHER THEY FILED THE PLEADINGS AND FAILED TO APPEAR TO DEFEND OR PROSECUTE, MAYBE REWORD THE RULE, THEN THERE'S NOT MUCH POINT IN THE PLAINTIFF SPENDING MONEYS ATTEMPTING TO DO [p. 9] ANYTHING FURTHER WITH THE CASE TILL WE HAVE SOME ASSURANCE THAT THERE'S SOMEBODY THERE WHEN HE GETS THE JUDGMENT, HE CAN EXECUTE IT AGAINST. AND THE WAY IT SOUNDS NOW, IF I GAVE HIM A JUDGMENT TODAY, I DON'T KNOW WHAT HE WOULD DO WITH IT. MAYBE HE KNOWS SOME THINGS THAT I DON'T, BUT I DOUBT IF THEY HAVE MANY ASSETS, OR THEY WOULD ALREADY HAVE BEEN TRYING TO GATHER THEM UP.

MR. CORBIN: I BELIEVE IT WOULD BE MORE FRUITFUL IN TRYING TO FIND THE ASSETS THAN TRYING TO FIND THE DEFENDANTS AT THIS POINT, YOUR HONOR, IF WE DID HAVE A JUDGMENT.

THE COURT: WELL, THAT'S ALL I AM SAYING. I DON'T KNOW THAT I AM ASKING YOU, MR. HARPER, TO CONSENT TO WHAT I AM TELLING THE PLAINTIFF THAT I THINK HE OUGHT TO DO. I GUESS I AM ASKING YOU TO CONSENT AS TO WHETHER YOU WANT ME TO HAVE THEM – I JUST THOUGHT SAME PUBLICATION MIGHT BE – JUST TAKE AN ADDITIONAL LINE OR TWO TO GET YOU RELIEVED.

NOW, I AM ASKING YOU TO CONSENT TO BEING RELIEVED AS COUNSEL, BECAUSE YOU MADE THE

MOTION. AND I DOUBT IF MR. CORBIN IS GOING TO ARGUE ABOUT THAT, BUT MAYBE HE WANTS YOU TO STAY IN, TOO.

MR. CORBIN: NO, SIR. I WOULD AGREE WITH HIS MOTION TO WITHDRAW.

THE COURT: THAT WOULDN'T JEOPARDIZE YOU, I DON'T THINK, MR. HARPER, THAT'S GOING TO GET THEIR ATTENTION, IF THEIR ATTENTION IS WORTH GETTING, OR IF THEY THINK IT IS. IF WE DON'T [p. 10] HEAR ANYTHING, I GUESS THEY CAN ALWAYS MAKE A MOTION AT SOME POINT DOWN THE LINE TO SET ASIDE THE JUDGMENT, BUT AT LEAST MR. CORBIN WOULD HAVE DONE ALL HE CAN DO, AND WE'LL HAVE THIS MATTER OFF OF THIS DOCKET, UNLESS THEY COME AND PROVE TO THE COURT IT OUGHT TO GO BACK ON.

MR. CORBIN: YOUR HONOR, MR. HARPER HAS HAD SEVERAL COMMUNICATIONS WITH ME OVER THE LAST YEAR-AND-A-HALF INDICATING THAT, IN FACT, HE WAS HAVING DIFFICULTIES IN REACHING HIS CLIENTS. SO I KNOW HE HAS PERFORMED A DILIGENT EFFORT TRYING TO FIND THEM.

THE COURT: I AM CONFIDENT THAT HE HAS, WHEN HE TOLD ME HE HAD, I WASN'T QUESTIONING THAT. ALL I AM SAYING IS THERE'S NOT MUCH POINT IN US CONTINUING TO DILLYDALLY AROUND. I MEAN THEY ARE THE DEFENDANTS IN THE CASE, AND IF THEY DON'T CARE ENOUGH ABOUT – THE ONLY THING I AM TRYING TO MAKE IT LEGALLY CORRECT, YOU ARE TELLING ME THAT

THE ORDER SAID, I DIDN'T EVEN LOOK BACK AT THAT TO TELL YOU THE TRUTH, THAT MR. HARPER COULD ACCEPT SERVICE FOR THEM, AND YOU SERVED THEM, AND THAT PART HAS BEEN CONCLUDED. AND IF HE HADN'T AGREED TO ACCEPT SERVICE, THEN YOU WOULD HAVE TO KIND OF FIND THEM OR SERVE THEM BY PUBLICATION OR SOMETHING SOMEWHERE. SO ALL I AM DOING IS JUST GOING ONE STEP FURTHER WITH THE RULE TO SHOW CAUSE FROM THE COURT, AND IF THEY DON'T RESPOND, THEN I THINK THAT PROTECTS MR. HARPER AND WILL PROTECT YOUR CLIENTS FOR WHATEVER THEY MIGHT BE ENTITLED TO.

[p. 11] NOW, IF IT TURNS OUT THAT THEY ARE IN KALAMAZOO, MICHIGAN, AND YOU ARE SERVING THEM BY PUBLICATION IN KEY WEST, FLORIDA, THAT WOULD BE AN ARGUMENT FOR ANOTHER DAY, BUT I MEAN I THINK THE RULE IS IN THE AREA IN WHICH THEY LAST LIVED OR WHATEVER KNOWN ADDRESS.

MR. CORBIN: YES, SIR.

THE COURT: I SUSPECT THAT MR. HARPER WOULD FURNISH YOU WITH THAT.

NOW, I'M OPEN TO ANY OTHER KIND OF – ·

MR. HARPER: THIS IS A FIRST FOR ME, YOUR HONOR.

THE COURT: WELL, WE FREQUENTLY HAVE PEOPLE THAT KIND OF DISAPPEAR, I WILL TELL YOU THAT, ESPECIALLY DEFENDANTS. WE ON OCCASION HAVE A PLAINTIFF WE CAN'T FIND. AND

THEN WE JUST DISMISS THE CASE WITHOUT PREJUDICE FOR FAILURE TO PROSECUTE, AND IF THE STATUTE HAS RUN, OF COURSE, THEY HAVE A PROBLEM, BUT IF IT HADN'T, IT GIVES THEM A RIGHT TO COME BACK IN.

AND I WOULDN'T HAVE ANY QUALMS ABOUT PUTTING THEM IN DEFAULT NOW AND STRIKING YOUR COUNTERCLAIM, IF I KNEW FOR A FACT THAT THEY KNEW THAT THEY HAD BEEN SUED, I AM TALKING ABOUT THE 180 DAY COMPLAINT, AND KNEW FOR A FACT THAT YOU HAD ANSWERED. BUT I GATHER FROM WHAT YOU-ALL ARE TELLING ME, THAT WE DON'T HAVE ANY ASSURANCE THAT ANY ONE OF THE THREE OF THEM ARE AWARE OF THAT, DO WE?

MR. HARPER: NO, SIR, WE DO NOT.

THE COURT: I MEAN THAT'S MY PROBLEM. I WOULDN'T [p. 12] HESITATE TO DO THAT, IF THAT WAS THE CASE, AND WE HAVE DONE THAT BEFORE. I DON'T KNOW THAT ANYBODY HAS EVER COLLECTED ON ANY OF THOSE JUDGMENTS, BUT WE HAVE DONE IT.

SO, MR. CORBIN, I WILL LOOK FOR YOU – IF YOU WILL SEND ME A RULE TO SHOW CAUSE THAT YOU THINK COMPORTS WITH WHAT I SAID, THEN I WILL SIGN IT AND SEND IT BACK TO YOU AND FIND OUT WHERE YOU WANT TO PUBLISH IT, AND THEN AFTER IT'S RUN, I DON'T REMEMBER WHAT THE STATUTE SAYS, WHATEVER THOSE PERIODS ARE, THE YOU CAN GET WHATEVER YOU NEED TO

PROVE YOUR DAMAGES, AND WE'LL SET A HEARING, AND YOU CAN COME BACK, OR ELSE YOU WILL COME BACK TO HEAR WHY WE OUGHT TO REOPEN THE CASE.

MR. CORBIN: YES, SIR. THANK YOU.

THE COURT: ANYTHING ELSE I CAN DO?

MR. HARPER: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED AT 3:17 O'CLOCK, P.M.)

CERTIFICATE

I DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ LaVon E. Denig
LAVON E. DENIG, RPR-CM
OFFICIAL COURT REPORTER

JULY 12, 1991

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Home Port Rentals, Inc., Plaintiff, vs. The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards, Defendants.	CIVIL ACTION NO.: 2:88-1167-1 RULE TO SHOW CAUSE (Filed Sept. 23, 1988)

TO: EACH OF THE ABOVE-INDICATED DEFENDANTS:

YOU ARE HEREBY ORDERED and required to show cause before me, if any you can, in open court on October 25, 1988, at 9:30 a.m. before the Honorable Falcon B. Hawkins, Judge of the Federal District Court of South Carolina, Charleston Division, Charleston, South Carolina:

(1) Why the Court should not enter a default order against each of the above-indicated Defendants granting the relief sought in the Complaint;

(2) Why Mikell F. Harper, Esquire, your attorney of record, should not be allowed to withdraw as counsel in the above-captioned matter in accordance with his August 1, 1988, motion to withdraw due to

non-cooperation and failure of each of the above-indicated Defendants to defend against the causes of action under the Complaint and prosecute the counterclaim;

(3) Why the counterclaim of the Defendants should not be stricken from the above-indicated matter with prejudice due to the failure of each of the above-indicated Defendants to cooperate with Mikell F. Harper, Esquire, in prosecuting such counterclaim;

(4) Why the Court should not award the Plaintiff a reasonable sum of punitive damages as requested in the above-indicated matter; and

(5) Why you should not be held in default for failing to make yourself available for depositions and other pre-trial discovery in accordance with the Federal Rules of Civil Procedure in the above-captioned matter?

/s/ Falcon B. Hawkins
Falcon B. Hawkins, Presiding Judge
Federal District Court of South
Carolina Charleston Division

At Chambers

Charleston, South Carolina

September 23rd, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HOME PORT RENTALS, INC., PLAINTIFF,	:	CIVIL ACTION NO. 2:88-1167-1
VS.	:	CHARLESTON, SOUTH CAROLINA
THE INTERNATIONAL YACHTING GROUP, INC., ETC., ET AL,	:	TUESDAY, OCTOBER 25, 1988 9:33 A.M.
DEFENDANTS.	:	

TRANSCRIPT OF SHOW CAUSE HEARING
BEFORE THE HONORABLE FALCON B. HAWKINS
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR THE PLAINTIFF:	DARYL J. CORBIN, ESQ. POST OFFICE BOX 447 FLORENCE, SOUTH CAROLINA 29503
FOR THE DEFENDANTS:	(NO APPEARANCE)
COURT REPORTER:	LAVON E. DENIG, RPR-CM OFFICIAL COURT REPORTER POST OFFICE BOX 835 CHARLESTON, SOUTH CAROLINA 29402 (803) 577-7301

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER AIDED TRANSCRIPTION.

[p. 2] TUESDAY MORNING SESSION,

OCTOBER 25, 1988.

THE COURT: NOW, MR. CORBIN, I AM SURE YOU HAVE HEARD ABOUT WHIPPING DEAD HORSES, AND I GOT A FEELING THAT'S WHAT YOU ARE HERE DOING.

MR. CORBIN: YES, SIR.

THE COURT: IN OUR ATTEMPTS TO SERVE THESE DEFENDANTS, WITH RETURN RECEIPTS REQUESTED, THEY ALL RETURNED BACK TO THE SENDER. SO, YOU KNOW, I WILL BE PRETTY MUCH GUIDED BY ABOUT ANYTHING YOU WANT TO DO.

MR. CORBIN: YES, SIR. IN ADDITION TO THE COURT'S ATTEMPT TO GIVE EACH DEFENDANT NOTICE, I ALSO HAD PUBLISHED IN THE LOCAL NEWSPAPER IN THE SAME COUNTY AS ITS BUSINESS AND THE LAST ADDRESS FOR THE DEFENDANTS A NOTICE, WHICH I WOULD LIKE TO PLACE IN THE RECORD.

THE COURT: WHERE WAS THAT?

MR. CORBIN: IT'S IN BROWARD COUNTY, FLORIDA, YOUR HONOR.

THE COURT: ALL RIGHT. WE'LL MAKE THAT PART OF THE RECORD, MADAM CLERK. YOU CAN MARK IT.

MR. CORBIN: I BELIEVE AT THIS POINT WE WOULD MOVE FOR A DEFAULT ORDER. THE DEFENDANTS - WE HAVE ATTEMPTED TO CONTACT THE DEFENDANTS. ACCORDING TO THE CONSENT ORDER AGREED TO BY THE DEFENDANTS IN THE LAST ACTION, THEY AGREE TO HAVE THEIR [p. 3] ATTORNEY, MIKELL HARPER, ACCEPT PROCESS, WHICH, IN FACT, HE HAS DONE. DURING THE LAST HEARING WE FILED WITH THE COURT AN AFFIDAVIT OF PERSONAL SERVICE. THE DEFENDANTS REFUSED TO COOPERATE WITH DEPOSITION NOTICES AND DISCOVERY ATTEMPTS.

IN ADDITION, WE FEEL AT THIS POINT THE PLAINTIFFS OUGHT TO BE ENTITLED TO A DEFAULT ORDER.

THE COURT: ALL RIGHT. MR. MARSHALL, OUT OF AN ABUNDANCE OF CAUTION, I AM GOING TO DO SOMETHING WHICH WE USED TO DO IN THE OLD DAYS. I WANT YOU TAKE THIS CAPTION OF THIS CASE OUT THERE IN THE HALL AND CALL THE NAMES OF ALL THESE DEFENDANTS THREE TIMES AND COME BACK IN HERE.

THE MARSHAL: ALL RIGHT, SIR.

THE COURT: I DOUBT VERY SERIOUSLY ANYBODY IS GOING TO ANSWER, BUT OCCASIONALLY THEY FIND PEOPLE SITTING OUT IN THE

HALL WONDERING WHERE THEY ARE SUPPOSED TO BE.

WHILE HE'S DOING THAT, MR. CORBIN, I GUESS IF YOU WILL JUST PREPARE ME A PROPOSED ORDER AND MAIL IT IN, UNLESS SOMEBODY ANSWERS, WHICH I DOUBT, THEN WE'LL TAKE CARE OF THE MATTER.

MR. CORBIN: IN ADDITION, YOUR HONOR, UNDER THE RULE TO SHOW CAUSE, MIKELL HARPER HAD ME INCLUDE IN THAT RULE A PROVISION TO RELEASE HIM AS COUNSEL FOR THESE DEFENDANTS.

THE COURT: YES. I WILL TAKE CARE OF THAT PART.

SO IN YOUR ORDER YOU CAN SHOW WHERE THE COURT HAD RELEASED HIM FROM ANY FURTHER REPRESENTATION OF THE DEFENDANTS [p. 4] FOR FAILURE TO COOPERATE WITH THE ATTORNEYS –

MR. CORBIN: YES, SIR.

THE COURT: – OR WHATEVER IS THE APPROPRIATE LANGUAGE.

THE MARSHAL: NONE OF THE NAMED PARTIES WERE PRESENT OUT THERE, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU.

ALL RIGHT. LET THE RECORD SHOW THAT THE DEFENDANTS' NAMES WERE CALLED IN THE HALL THREE TIMES AND NO RESPONSE WAS HEARD.

OKAY. WE'LL BE AT RECESS.

(PROCEEDINGS CONCLUDED AT 9:38 O'CLOCK, A.M.)

CERTIFICATE

I DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ LaVon E. Denig
LAVON E. DENIG, RPR-CM
OFFICIAL COURT REPORTER

DECEMBER 11, 1990

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Home Port Rentals, Inc., Plaintiff,	)	CIVIL ACTION NO.: 2:88-1167-1
vs.	)	DEFAULT ORDER
The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards, Defendants.	)	(Filed Oct. 31, 1988)

This matter came before me pursuant to the Court's Rule to Show Cause issued on behalf of the Plaintiff dated September 23, 1988. In accordance with such Rule to Show Cause, the Plaintiff sought an order (a) finding the International Yachting Group and each of the above-named personal Defendants in default; (b) awarding the Plaintiff a reasonable sum of actual and punitive damages against each of the above-named Defendants; and (c) striking with prejudice the pending counterclaims of the above-named Defendants against the Plaintiff in this matter. The grounds for such default order against each of the above-named Defendants were (a) lack of the Defendants' cooperation in discovery matters; (b) refusal of the above-indicated Defendants to submit to depositions; and (c) failure of the above-named Defendants to participate in prosecution and defense of the above-captioned matter. Appearing on behalf of the Plaintiff was Daryl J.

Corbin, Esquire, Florence, South Carolina; and none of the Defendants made any appearance or response to the Court's Rule to Show Cause.

The Court attempted to serve each of the above-named Defendants with the Rule to Show Cause through certified mail sent to the last known address of the Defendants in Dania, Florida, with respect to the hearing and relief sought on behalf of the Plaintiff. However, such certified notices were returned to the Court unaccepted. Furthermore, the Plaintiff introduced into evidence a certified publication notice printed in the Sun-Tattler Newspaper of Broward County, Florida, a newspaper with common circulation in Dania, Florida, dated October 3, 1988, providing notices to each of the above-named Defendants in this matter to appear at this hearing. Moreover, prior to the hearing on October 25, 1988, the Court beckoned each of the above-named Defendants three (3) times in the hallway of the courtroom with no response.

Accordingly, I find that each of the Defendants in this matter should be held in default; and the counterclaims of such Defendants against the Plaintiff should be stricken with prejudice. Therefore, I rule that each of the above-named Defendants is in default and jointly and severally liable to the Plaintiff for actual and punitive damages as requested in this matter.

IT IS SO ORDERED.

/s/ Falcon B. Hawkins
Falcon B. Hawkins
United States District Judge

Charleston, South Carolina

November ___, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HOME PORT RENTALS, INC.,	:	CIVIL ACTION NO. 2:88-1167-1
PLAINTIFF,	:	
VS.	:	CHARLESTON, SOUTH CAROLINA
THE INTERNATIONAL YACHTING GROUP, INC., ETC. ET AL,	:	WEDNESDAY, MARCH 1, 1989
DEFENDANTS.	:	12:50 P.M.

TRANSCRIPT OF HEARING ON DEFAULT JUDGMENT
BEFORE THE HONORABLE FALCON B. HAWKINS
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR THE PLAINTIFF: DARYL J. CORBIN, ESQ.
POST OFFICE BOX 447
FLORENCE,
SOUTH CAROLINA 29503

COURT REPORTER: LAVON E. DENIG, RPR-CM
OFFICIAL COURT
REPORTER
POST OFFICE BOX 835
CHARLESTON,
SOUTH CAROLINA 29402
(803) 577-7301

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER AIDED TRANSCRIPTION.

[p. 2] WEDNESDAY AFTERNOON SESSION,
MARCH 1, 1989.

THE COURT: FIRST, LET ME ASK YOU, IS ANYBODY HERE FOR ANY OF THE DEFENDANTS?

MR. CORBIN: NOT TO MY KNOWLEDGE, YOUR HONOR, AGAIN AS THEY HAVE NOT APPEARED THE LAST THREE OR FOUR TIMES.

THE COURT: ALL RIGHT, SIR. SO IF THE COURT REPORTER IS DOWN THERE, I AM READY FOR YOU TO GIVE THE COURT WHATEVER PROOF YOU MIGHT NEED TO ESTABLISH YOUR DAMAGES.

MR. CORBIN: YES, SIR. AT THIS TIME WE WOULD CALL MR. MIKE MCEACHERN, THE PRESIDENT OF HOME PORT RENTALS, INC., TO THE WITNESS STAND, PLEASE.

THE CLERK: STATE YOUR FULL NAME.

THE WITNESS: MICHAEL JOSEPH MCEACHERN.

THE CLERK: WOULD YOU SPELL YOUR LAST NAME.

THE WITNESS: M C CAPITAL E A C H E R N.

MICHAEL JOSEPH MCEACHERN, PLAINTIFF'S WITNESS, SWORN DIRECT EXAMINATION

BY MR. CORBIN:

Q. MR. MCEACHERN, PLEASE STATE YOUR COMPLETE NAME FOR THE RECORD.

A. MICHAEL JOSEPH MCEACHERN.

Q. MR. MCEACHERN, WHAT IS YOUR RELATIONSHIP TO THE PLAINTIFF [p. 3] IN THIS ACTION, HOME PORT RENTALS, INCORPORATED?

A. I AM THE PRESIDENT OF HOME PORT, HAVE BEEN SINCE IT WAS FORMED.

Q. MR. MCEACHERN, IN THIS CAUSE OF ACTION, YOU HAVE THREE CAUSES. UNDER THE FIRST CAUSE OF ACTION IS BREACH OF CONTRACT. ARE YOU FAMILIAR WITH BASED UPON A PERSONAL RELATIONSHIP WITH RESPECT TO THE TERMS OF THE CONTRACT BETWEEN THE DEFENDANTS AND YOUR COMPANY?

A. YES, I AM. I PARTICIPATED IN ALL OF IT.

Q. ARE YOU AWARE OF THEM BREACHING THAT PARTICULAR CONTRACT?

A. I CERTAINLY AM.

Q. MR. MCEACHERN, AS A RESULT OF THAT BREACH OF CONTRACT, DID THE CORPORATION INCUR DAMAGES?

A. YES, IT DID.

Q. DID I ALSO ASK YOU TO PREPARE A DAMAGE SUMMARY BASED UPON THE CORPORATE

RECORDS TO VALIDATE THE ACTUAL FINANCIAL LOSSES IN THIS MATTER AS A RESULT OF THE BREACH OF CONTRACT?

A. YOU DID, AND I PREPARED ONE.

MR. CORBIN: YOUR HONOR, AT THIS TIME I WOULD LIKE TO INTRODUCE PLAINTIFF'S EXHIBIT NO. 1, WHICH IS THE SUMMARY OF FINANCIAL LOSSES UNDER THE FIRST CAUSE OF ACTION.

THE COURT: ALL RIGHT, SIR.

BY MR. CORBIN:

Q. MR. MCEACHERN, AS A RESULT OF THE BREACH OF CONTRACT COMMITTED BY THE DEFENDANTS IN THIS CASE INVOLVING YOUR [p. 4] CORPORATION, HOW MUCH IN ACTUAL FINANCIAL LOSSES DID THE COMPANY INCUR?

A. MY CALCULATIONS TOTAL 381,483 DOLLARS AND 47 CENTS.

Q. MR. MCEACHERN, COULD YOU INDICATE TO THE COURT EXACTLY HOW THIS COMPUTATION OF DAMAGES WAS ATTAINED.

A. WELL, WHEN IT BECAME EVIDENT THAT WE WERE GOING TO HAVE TO GO TO COURT OVER THE BREACH OF CONTRACT, I HAD OUR CONTROLLER PREPARE FROM OUR COMPANY RECORDS AN OPERATING LOSS PICTURE, WHICH HE DID. THAT IS THE LARGEST COMPONENT, 155,370 DOLLARS. THAT BEING BASED ON THE CASH BASIS. I THEN ADDED TO THAT PAYABLES KNOWN TO ME AND OTHER LOSSES WHICH HAD TO BE TAKEN AS A RESULT OF

OUR FINAL FAILURE WHICH STEM FROM THE BREACH OF CONTRACT.

Q. MR. MCEACHERN, UNDER THE SECOND CAUSE OF ACTION FOR FRAUD, ARE YOU AWARE OF REPRESENTATIONS MADE TO YOUR COMPANY BY THE DEFENDANTS IN THIS CASE WITH RESPECT TO THE FRANCHISE AGREEMENT?

A. YES, I AM.

Q. WERE THERE REPRESENTATIONS MADE TO THE COMPANY WITH RESPECT TO HOW MUCH TO EXPECT ON A MONTHLY BASIS WITH RESPECT TO NET PROFITS?

A. WE WERE TOLD WE COULD EXPECT IN EXCESS OF 20 THOUSAND DOLLARS A MONTH.

Q. BASED UPON THE TERMS OF THE FRANCHISE AGREEMENT, WAS THERE A SPECIFIC LENGTH OF TIME DURING WHICH THE CORPORATION WAS TO [p. 5] EXPECT 20 THOUSAND DOLLARS PER MONTH IN NET PROFITS?

A. THE FRANCHISE AGREEMENT WAS FOR FIVE YEARS, AND WE WOULD HAVE THREE FIVE-YEAR RENEWAL OPTIONS.

Q. HAVE YOU HAD AN OPPORTUNITY TO CALCULATE THE AMOUNT OF NET PROFITS PROMISED TO YOU BY THE DEFENDANTS BASED UPON THE TERMS OF THE FRANCHISE AGREEMENT?

A. WELL, WE CALCULATED IT CERTAINLY AT THE TIME TO BE AT LEAST ONE MILLION TWO HUNDRED THOUSAND DOLLARS OVER THE COURSE OF THE FIVE-YEAR FIRST AGREEMENT.

Q. MR. MCEACHERN, WITH RESPECT TO THE THIRD CAUSE OF ACTION FOR SECURITIES VIOLATIONS, COULD YOU DESCRIBE HOW THE DEFENDANTS DESCRIBED THE CLUB NAUTICAL INVESTMENT CONCEPT TO YOU.

A. WELL, JUST THAT IT WAS A FRANCHISE INVESTMENT, THAT IT WAS TRIED, PROVEN. THEY HAD MANY OTHER INVESTORS, NONE OF WHOM HAD LOST MONEY EVEN FOR SO MUCH AS A MONTH. IT WAS – THEY WERE BATTING A THOUSAND AT THAT POINT.

IT WAS AN INVESTMENT WHICH WAS APPEALING, BECAUSE WE WERE INVOLVED IN BOAT RENTALS, SO THAT'S ABOUT IT.

Q. AS A RESULT OF THE REPRESENTATIONS MADE TO YOU BE THE DEFENDANTS TO INDUCE YOU TO INVEST IN THIS SECURITY OR INVESTMENT, DID THE CORPORATION LOSE MONEY?

A. WE CERTAINLY DID. WE LOST 381 THOUSAND PLUS DOLLARS.

MR. CORBIN: YOUR HONOR, AT THIS TIME WE WOULD ASK THE COURT TO INQUIRE OF ANY OTHER QUESTIONS YOU WOULD LIKE TO POSE.

[p. 6] THE COURT: I DON'T HAVE ANY QUESTIONS AT THIS TIME.

MR. CORBIN: THANK YOU.

THANK YOU, MR. MCEACHERN.

MR. CORBIN: YOUR HONOR, AT THIS TIME WE WOULD MOVE THE COURT FOR A JUDGMENT UNDER THE THREE CAUSES OF ACTION PURSUANT TO THE DEFAULT ORDER.

UNDER THE FIRST CAUSE OF ACTION, THE TESTIMONY HAS BEEN THAT THE CORPORATION INCURRED 381,483 DOLLARS AND 47 CENTS IN ACTUAL DAMAGES.

UNDER THE SECOND CAUSE OF ACTION, COMMON LAW FRAUD, THE COURT HAS AGREED TO AWARD A SUFFICIENT AMOUNT OF PUNITIVE DAMAGES.

UNDER THE FRAUD THEORY, THE CORPORATION WAS PROMISED 20 THOUSAND DOLLARS PER MONTH IN NET PROFITS FOR A PERIOD OF FIVE YEARS, WHICH TOTALS 1.2 MILLION DOLLARS IN ACTUAL LOSSES AT THIS POINT. IN ADDITION, WE WOULD REQUEST A REASONABLE SUM IN PUNITIVE DAMAGES UNDER THE SECOND CAUSE OF ACTION.

PURSUANT TO THE THIRD CAUSE OF ACTION, UNDER THE SECURITIES LAWS OF THE STATE OF SOUTH CAROLINA, THE PLAINTIFF IS ENTITLED TO ACTUAL LOSSES OF 381,483 DOLLARS AND 47 CENTS AS WELL AS SIX PER CENT INTEREST ON THAT SUM FROM THE DATE OF THE FRANCHISE AGREEMENT.

THEREFORE, WE WOULD MOVE THE COURT FOR A DEFAULT JUDGMENT TO BE ENTERED UNDER THE THREE CAUSES OF ACTION PURSUANT [p. 7] TO THE TESTIMONY.

THE COURT: ALL RIGHT, SIR. WE WILL PREPARE AN ORDER AFTER I HAVE HAD AN OPPORTUNITY TO REVIEW, I GUESS, PLAINTIFF'S EXHIBIT 1, WHICH IS THE ONLY EXHIBIT, IS THAT CORRECT?

MR. CORBIN: THAT IS CORRECT. THAT WAS BASED UPON THE CORPORATE RECORDS AND IS A SUMMARY BASED UPON THE FINANCIAL RECORDS AS WELL AS BANKING RECORDS OF THE CORPORATION.

THE COURT: ALL RIGHT, SIR. IF I HAVE ANY PROBLEMS WITH IT, WE WILL GET IN TOUCH WITH YOU.

MR. CORBIN: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

(PROCEEDINGS CONCLUDED AT 12:56 O'CLOCK, P.M.)

[p. 8] INDEX

PLAINTIFF'S WITNESSES: DIRECT CROSS REDIRECT RECROSS REDIR. MICHAEL JOSEPH MCEACHERN 2

EXHIBITS

PLAINTIFF'S:	MARKED	RECEIVED
1 SUMMARY OF FINANCIAL LOSSES	3	3

CERTIFICATE

I DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ LaVon E. Denig
LAVON E. DENIG, RPR-CM
OFFICIAL COURT REPORTER

JULY 12, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HOME PORT RENTALS, INC., Plaintiff, vs. THE INTERNATIONAL YACHTING GROUP, INC., a Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, and JIM EDWARDS, Defendants.	CIVIL ACTION #2:88-1167-1 ORDER (Filed Mar. 17 1989)

This matter came before at a hearing held March 1, 1989, to establish compensatory and punitive damages pursuant to the October 31, 1989 order of this court granting the plaintiff's default judgment against the defendants. The plaintiff and its counsel were present at the March 1, 1989 hearing, but, despite adequate notice to the defendants of this hearing, none of the defendants nor defense counsel on their behalf were present. In addition, the President of Home Port Rentals, Inc. (Home Port) provided testimony as to the monetary losses of the corporation in the matter; and a detailed summary of the plaintiff's financial damages compiled from its business records substantiating damages was introduced in evidence.

Based upon the pleadings, the previous orders of the court, the documents submitted in evidence, the complete

file in this matter, and the testimony of the president of Home Port, I find the salient facts as to the financial damages are as follows:

1. Under the first cause of action for breach of contract, the plaintiff, in accordance with the testimony and documentary evidence introduced in this matter, is entitled to actual damages of $381,483.47.

2. Under the second cause of action for common law fraud, the plaintiff is entitled to $20,000 per month as represented to it by the defendants in conjunction with the "Club Nautico" investment scheme for the contractual term of five (5) years totaling $1,200,000. In addition, in accordance with the previous order of the court, the plaintiff is entitled to a reasonable sum of punitive damages; accordingly, the plaintiff is entitled to $50,000 punitive damages in this matter.

3. Under the third cause of action for violations of the South Carolina Uniform Securities Act, the plaintiff is entitled to $381,483.47 in actual damages in accordance with the documentary evidence and testimony presented in this matter. Furthermore, pursuant to S.C. CODE ANN. § 35-1-1490 (Law Co-op. 1976), the plaintiff is entitled to interest accruing on such sum since May 1, 1985, at the annual rate of six (6%) percent for an additional sum of $87,542.74. The total damages under the Uniform Securities Act is $469,026.21.

Of course, the plaintiff is not entitled to be placed in a better position because of the defendants' wrongful acts

then it the position in which it would have been absent those wrongful acts. The actual damages which plaintiff seeks to recover under the first and third causes of action appear to be out-of-pocket expenses which the plaintiff would have incurred absent the breach. Thus, if the court is to award the benefit of plaintiff's bargain under the second cause of action, it cannot also compensate plaintiff for is [sic] out-of-pocket expenses.

Similarly, the interest allowed on the "actual" damages compensates the plaintiff for the "profit" which the money would have earned had it not been tied up in the fraudulent project. That interest could not have been earned if the project had gone according to its design and the plaintiff had earned instead the $20,000 pre [sic] month which it seeks to recover under the second cause of action. The court, therefore, finds that awarding plaintiff the interest on its out-of-pocket expenses in addition to lost profits would place the plaintiff in a better position than it could have possibly been in absent the fraud. Based on the foregoing, it is

ORDERED, that the clerk of court enter judgment for the plaintiff against the defendants in the amount of one million two hundred thousand and no/100ths ($1,200,000.00) dollars actual damages and fifty thousand and no/100ths ($50,000.00) punitive damages.

AND IT IS SO ORDERED.

/s/ Falcon B. Hawkins
Falcon B. Hawkins
United States District Judge

Charleston, S.C.

March 16, 1989

Randall M. Chastain
Attorney at Law
(803) 777-7750
(803) 799-6889

418 Edisto Avenue
Columbia, South Carolina 29205

13 May 1989

Mr. Peter Ruben
4 Stanton Way
Mill Valley
California 94941

Re: Default Judgment

Dear Mr. Ruben:

Enclosed is an operating printout of your ledger card and the initial opening statement, simply for your information. Please check all terms specified and let me know if there is any problem.

You will note that my hourly rate is $200, that you have deposited $2500 as a retainer, and that late payments will be billed at an 18% APR. I will bill approximately monthly.

I would appreciate your signing the enclosed extra copy of this letter and initialing the attachments to the copy and returning them all to me in the also enclosed preaddressed postage-paid envelope. This will constitute our contract for legal services.

More substantive information will come shortly.

Best regards.

Sincerely,

RMC/llb /s/ Randall M. Chastain
Encl. Randall M. Chastain

I agree to the terms specified: /s/ Peter Ruben
Peter Ruben

STATE OF CALIFORNIA)
) AFFIDAVIT
COUNTY OF MARIN)

COMES NOW THE UNDERSIGNED, FIRST BEING DULY SWORN, AND DEPOSES AND SAYS:

(1) That he is now a citizen and resident of Mill Valley, California, and has been since 1 September 1988.

(2) That he was a Defendant at one time in that certain action captioned *Home Port Rentals v. The international* [sic] *Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards,* No. 2 86 2141 1 (hereinafter "the first action"), filed in the Charleston Division of the United States District Court for the District of South Carolina on 13 August 1986.

(3) That in that action, F. Mikell Harper, Esq., of the South Carolina Bar was retained by Defendant Denny Allen to defend himself and the corporate Defendant, and was requested by Mr. Allen to represent all Defendants.

(4) That the first action was defended and a counterclaim was pleaded against the Plaintiff, all as is more particularly set forth in the attached Answer and Counterclaim and First Amended Answer and Counterclaim ("Exhibit 1") both of which are incorporated in this Affidavit by reference as though set forth at this place *verbatim.* Additionally, issues of the Court's jurisdiction to proceed were raised in a Rule 12(b)(6) Motion to Dismiss, which is attached hereto and designated Exhibit 2, and is incorporated herein as though set forth at this place *verbatim.*

(5) That he is informed and believes that substantial discovery took place in the first action.

(6) That the first action terminated in a voluntary nonsuit, as is reflected in the Consent Order apparently signed by counsel, but not the parties, dated 4 November 1987 ("Exhibit 3") attached hereto and incorporated herein as though set forth here *verbatim*, but that the Affiant had no knowledge of the terms of that consent Order, but instead was informed and believed that the entire suit had been settled and terminated either at the time of the consent Order or by later action by the corporate Defendant subject to the direction of Mr. Allen.

(7) That the aforementioned Consent Order contains a provision purporting to permit Mr. Harper to accept service on behalf of all Defendants in the event the suit should be refiled.

(8) That the Affiant never gave permission to F. Mikell Harper, Esq., or anyone else, to accept service on his behalf, and had no knowledge of any terms of any consent agreement or any other form of agreement which would permit this to be done, and does not believe that he at any point surrendered or waived his right and need for personal service, which is calculated and intended to provide notice of the existence and nature of any legal complaint made against a person; he in all events never intended any such surrender or waiver.

(9) That he believed that any remaining questions in the case had been settled after he heard from the lawyer for a company called Outboard Marine Corporation (OMC), which was a shareholder in a company named

Adventurent (Adventurent having purchased substantially all the assets of the Defendant International Yachting Group, Inc. (IYG)), that OMC had agreed to pay a nominal nuisance value sum to Home Port to end any remaining possibility of suit; this was in (at the latest; it might have been earlier) the spring of 1987.

(10) That from that time on he had heard nothing more in any way about this matter until March of 1989 when the husband of the former treasurer of IYG (who lived next door to the former office of IYG in Dania, Florida), was misdelivered a certified letter for the undersigned, and forwarded it to him. That letter was the final judgment of the Court making the default award. Defendant stresses most urgently that he never had any notice of any kind until that moment of the existence, nature, or prosecution of that action captioned identically to the first action, but numbered 2 88 1167 1.

(11) That he then attempted to contact Mr. Harper, and eventually succeeded, ascertaining that Mr. Harper had been fully aware of these matters and had not contacted the Affiant, although he said that he sent one letter to Affiant's very old address in Dania, Florida, when the action was recommenced, which letter was apparently returned undelivered.

(12) That on information and belief, Mr. Harper had apparently withdrawn as counsel several months after the purported acceptance of service and the commencement of the second action, all without his having had any contact whatsoever with Affiant despite Affiant's ready availability.

(13) That the Affiant's whereabouts were easily available to anyone with any actual interest in ascertaining them. Affiant was at the same address from August 1986 through August 1988, that address being 581 Lake Dasha Blvd., Plantation, Florida. His telephone number was listed in the Fort Lauderdale, Florida, telephone directory under his own name (it was (305) 472-8724). On information and belief, this time period included the time of the apparent filing of the second action and Mr. Mikell's purported attempts at locating the Affiant, and Mr. Mikell's withdrawal as attorney for all Defendants, none of which he purported to be able to reach.

(14) That, further, after 1 September 1988 and until April of 1989, Affiant continued to own the 581 Lake Dasha Blvd. property, renting it out, and was in regular contact with the renters (who ultimately purchased the property). Affiant would have received any mail or other communications directed to him at that address.

(15) That, further, a forwarding address was left at the post office at any and all places at which Affiant lived, both before and after the time period here in question.

(16) That, further, the aforementioned Adventurent corporation, which purchased most of IYG's assets as earlier described, had entered into a contract to manage the remaining activities of IYG. Adventurent moved its offices from Dania, Florida, to Fort Lauderdale in early 1987, approximately, leaving a forwarding address when it did so. Mail for IYG and Adventurent was in fact forwarded normally during the usual time following the move. Nothing ever arrived having anything to do with

either the first or second action, including any information about the purported consent Order or any recommencement of the underlying action.

(17) That the principals of Home Port, the Plaintiff in both actions one and two, knew all of the movements of IYG and Adventurent, and knew of Affiant's relationship with each company, because they had a separate ongoing controversy with Adventurent and were completely informed about the relationship between IYG and Adventurent, including the buyout and the management agreement. Home Port had complete and accurate information and knowledge of the whereabouts of the Affiant's company and corporate activities at all relevant times during this matter.

(18) That Affiant is informed and believes that there exist several good defenses to the original action, and that IYG has a good counterclaim against the Plaintiff, and that it would be contrary to the interests of justice to allow this default judgment to stand, particularly since it is based not upon a failure to respond to a complaint but upon purported failure to deal with subsequent discovery issues in the case, which he would have gladly handled had he but known about them – which he should have, since his whereabouts were always known to the Plaintiff and were easily available to Mr. Mikell or anyone else with a slight amount of effort.

(19) That after fruitless contact with Mr. Mikell following March of 1989 the Affiant contacted his present attorney, Mr. Randall M. Chastain, who has proceeded since that time to gather information from the file (Affiant is informed and believes that it was difficult for Mr.

Chastain to obtain his file from Mr. Mikell) and otherwise, and has informed Affiant that it is worthwhile to attempt to invalidate the default judgment and proceed to trial on the merits if necessary.

(20) That Affiant is further informed and believes, without abandoning his positions regarding his lack of notice, that even under the purported consent Order described above the Plaintiff is proceeding without jurisdiction at the present time since the terms of the Order were not complied with.

(21) That Affiant wishes this Honorable Court to know that he views himself as a responsible businessman who is fully well aware that he must comply with legal processes and who would have done so gladly had he but known of the existence of the second action. He earnestly requests of the Court that he now be allowed to have such an opportunity.

AND FURTHER AFFIANT SAITH NOT.

/s/ Peter Ruben (L.S.)
Peter Ruben

SWORN TO AND SEALED BEFORE ME

THIS 5th DAY OF FEBRUARY 1990.

[SEAL]

/s/ Illegible
NOTARY PUBLIC FOR CALIFORNIA

MY COMMISSION EXPIRES May 25, 1991.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

NO. 2:88-1167-1

HOME PORT RENTALS, INC., Plaintiff, V. THE INTERNATIONAL YACHTING GROUP, INC., A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS, Defendants.	)	MOTION TO VACATE JUDGMENT

COMES NOW DEFENDANT PETER RUBEN AND MOVES THIS HONORABLE COURT to vacate and set aside the judgment against him entered on 20 March 1989 in this action, and all subsequent proceedings thereon, and to allow this defendant to procede [sic] to adjudicate this cause by trial upon the Answer already filed and any proper Amendments thereto as may seem meet, appropriate, and just, on the ground (1) of excusable neglect, inadvertance, surprise, or mistake; and (2) that the judgment is void as to him for want of jurisdiction; and (3) that no proper and adequate steps to locate him and proceed with the defense of the lawsuit were taken either by the Plaintiff or by his own prior attorney so that to enforce the judgment against him would be unfair, aside from the prior considerations and would unjustly enrich the Plaintiff, particularly inasmuch as there is good and adequate defense to be made against the charges as is set

forth in the Answer originally propounded and such amendments as may be appropriate hereafter.

Attached hereto are the requisite Memorandum and an Affidavit of the Defendant Peter Ruben.

Respectfully submitted,

/s/ Randall M. Chastain
Randall M. Chastain
418 Edisto Ave.
Columbia, S.C. 29205

ATTORNEY FOR DEFENDANT RUBEN

Columbia, S.C.

13 March 1990

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

NO. 2:88-1167-1

HOME PORT RENTALS, INC., Plaintiff, V. THE INTERNATIONAL YACHTING GROUP, INC., A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS, Defendants.	AFFIDAVIT (Filed July 9, 1990)

April 27, 1990

Mr. Randall Chastain

By Facsimile

Dear Mr. Chastain,

I have reviewed the "Return and Memorandum in Opposition to the Defendant's Motion to Vacate Judgment" filed on behalf of Home Port Rentals.

This document makes several claims which are untrue. Generally, these fall into three categories:

a) Action – they falsely state that I was more active in the outset of the case than I actually was.

b) Knowledge – they falsely claim that I had knowledge of the evolution of the case which I did not have.

c) Motive – they falsely claim that I attempted to avoid contact, which I did not do.

More specifically:

A. Action

The document states that "Ruben responded to interrogatories, requests to admit, and attended a deposition of the president of the corporate Plaintiff." This is untrue, as is demonstrated by the very attendance pages which their attorney attached to the document. I definitely did not attend the deposition and, to the best of my knowledge, was never asked to respond to any interrogatories, nor did I participate in any discovery as stated in paragraph (2) of the document.

The reason that I did not take an active role in this case is because a) initially, I was given the belief that the legal defenses taken on behalf of The International Yachting Group, Inc. would encompass and serve the interests of the individual defendants and b) eventually, I was of the belief that the case had been dismissed.

B. Knowledge

The document states in paragraph (5) that Mr. Harper's reassertion of defenses in 1988 indicated my "knowledge and participation in this matter".

That Mr. Harper automatically reasserted these defenses does not in any way indicate that I had knowledge or participation. In fact, the opposite is indicated in subsequent court documents in which Mr. Harper asked permission to be excused from the case because he had had no contact with the defendants. I had no knowledge

whatsoever of any of these events, until after I received the notice of judgment award on the first of April, 1989.

C. Motive

Paragraph (6) of the document states that since March, 1989 I was "not doing anything but laying low and perhaps hoping the Plaintiff would never be able to find him in California". This statement is completely untrue in two regards:

1. Immediacy of Action

Within two days of learning that this case had been renewed and a judgment awarded, I retained local counsel, Mr Paul Stewart of San Francisco, to advise me on what actions to take.

Mr. Stewart immediately requested copies of all court documents to assess what had transpired and whether defenses should be filed in California or South Carolina. These records were received and reviewed over an approximate period of two weeks.

At this point, Mr. Stewart decided that I should retain counsel in South Carolina and undertook to find a recommended referral. During this, the third week, I was put in touch with Mr. Chastain and couriered copies of the court documents to him for his review and assessment.

Approximately one week later, subsequent to review and discussions with Mr. Chastain, I retained him as my attorney. Since then, while being guided on all matters pertaining to this case, I have endeavored to always respond and act in timely fashion.

2. Attempts to "Lie Low"

Firstly, as stated in an earlier deposition, I have always maintained as much visibility as possible: leaving change of address notices after each residential move, maintaining listed phone numbers, and maintaining contact with Adventurent, the Club Nautico boating operations that was the successor to International Yachting Group.

Secondly, far from "lying low", I took active steps to contact the plaintiff within three weeks of discovering the situation.

In mid-April, having received an initial assessment of the potential legal fees to be faced, I tried to reach Michael McEachern to discuss the possibility of a modest settlement.

I called the office of the Plaintiff's attorney, Daryl Corbin, on April 18th. He was not available so I asked his secretary for the home and office phone numbers for Michael McEachern, president of the corporate plaintiff.

Although I was not able to reach Michael, who was reportedly out of the country on business, I did speak to his wife. I explained who I was, that I had been unaware of the lawsuit and judgment but would like to discuss a settlement in lieu of legal fees. She said she felt sorry for my particular situation but she understood the case to be settled and final.

At this point I left her my San Francisco phone number and asked to have Michael call me if he wished to talk. Not hearing back, I abandoned any further attempts for reconciliation and engaged Mr. Chastain to seek legal remedy.

I hereby swear that the above statement is true statement of fact.

/s/ Peter Ruben

STATE OF CALIFORNIA)
) SS.
COUNTY OF MARIN)

On July 5th, 1990 before me, the undersigned, a Notary Public in and for said County and State, personally appeared Peter Ruben personally known to me or proved to me on the basis of satisfactory evidence to be the person ___ whose name is subscribed to the within instrument and acknowledged that he executed the same.

[SEAL]

WITNESS my hand and official seal.

Signature /s/ Laureen Graetz

(This area for official notarial seal)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

NO. 2:88-1167-1

HOME PORT RENTALS, INC., Plaintiff, V. THE INTERNATIONAL YACHTING GROUP, INC., A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS, Defendants.	SUPPLEMENTAL POST=HEARING AFFIDAVIT (Filed July 17, 1990)

STATEMENT OF AFFIDAVIT

Re: Home Port Boat Rentals vs. International Yachting Group, Denny Allen, Roger Moore, Jim Edwards, and Peter Ruben

I, Peter Ruben, do hereby swear that the following represents my true knowledge and beliefs pertaining to efforts by both Michel [sic] Harper, the attorney originally representing the defendants and Darryl [sic] Corbin, the attorney for the plaintiffs to communicate with me regarding the resumption of the above lawsuit:

Despite claims that exhaustive and comprehensive efforts were made by both Mr. Harper and the Plaintiffs to contact me, in fact:

a) absolutely no attempt was made by Mr. Harper.

b) only a token effort was made by the Plaintiffs.

Specifically:

1. Both Mr. Harper and the Plaintiffs were aware that in early 1987, International Yachting Group and its successor, Adventurent, moved their business headquarters from Dania, Florida to Fort Lauderdale, Florida.

This is evidenced on the part of Mr. Harper by the fact that in May, 1988 he addressed a letter to Mr. Denny Allen at this address. It is evidenced on the part of the plaintiffs by the fact that they have continued to engage in a lawsuit with Adventurent at this address from the date of the move through to the present.

Notwithstanding this knowledge by both parties:

a). No letter was addressed to me by Mr. Harper, at any address, at any time (as evidenced by his correspondence file).

b). No letter was addressed to me by the Plaintiffs or Mr. Corbin at any time at the Ft. Lauderdale business adress. [sic](In fact, the plaintiffs do not give evidence that they even sent any letter to me at the old Dania business address).

Further, contrary to allegations made by Mr. Corbin, I swear that at no time have I ever avoided or rejected receipt of a certified letter, nor failed to retrieve a certified letter if I was aware of its existence at any location.

Signed under oath at Cuyahoga Falls, Ohio, on July 11, 1990.

Peter Ruben SEAL
/s/ Peter Ruben

KAREN S. DRATWA, Notary Public
State of Ohio
My Commission Expires Jan. 16, 1992

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

NO. 2:88-1167-1

HOME PORT RENTALS, INC., Plaintiffs, vs. THE INTERNATIONAL YACHTING GROUP, INC., A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS, Defendant.	AFFIDAVIT OF PAUL A. STEWART IN SUPPORT OF MOTION BY PETER RUBEN FOR RECONSIDERATION OF ORDER DENYING MOTION TO VACATE DEFAULT JUDGMENT

THE UNDERSIGNED, PAUL A STEWART, BEING FIRST DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

1. I am an attorney at law, duly admitted to practice before all state and federal courts in the State of California. I have personal knowledge of the facts stated herein, and I could and would competently testify thereto if called as a witness. I make this affidavit in support of the pending motion by Peter Ruben to reconsider denial of his March, 1990 motion to vacate the default judgment entered against him herein in March of 1989.

2. Peter Ruben contacted me on April 3 of 1989 with respect to this matter. He told me that he had just received notice of a $1,200,000 default judgment entered

against him in this case, and that he was shocked because he did not know there was any lawsuit pending against him. Mr. Ruben told me that, while there had been an earlier lawsuit pending against him and others brought by the named plaintiff, to the best of his knowledge it had been dismissed, and that he did not know it had been refiled. Mr. Ruben said that he was never served with any summons or complaint and that he had no contact with either the plaintiff, or with any attorney allegedly acting on Mr. Ruben's behalf, with respect to this refiled case.

3. Mr. Ruben asked me if I could represent him with respect to this default judgment. I told him that I could not, and that what he needed to do was to retain an attorney in South Carolina to represent him in this matter. Mr. Ruben asked me if I could help him find an attorney in South Carolina, and I said that I would do so. I also told Mr. Ruben that I would obtain for him a copy of the federal court file on this matter, which I did in early April of 1989. I mailed my check to this court on April 7, 1989, to pay for a copy of the file.

4. I believe Peter Ruben acted diligently with respect to his attempts to set aside this default against him, based upon the following facts:

(a) On April 3, 1989, Peter Ruben faxed to me a copy of the Order dated March 17, 1989 entering his default, and the judgment entered thereon, dated March 20, 1989. A copy of the facsimile cover sheet is attached as Exhibit A.

(b) I then immediately begin searching for an attorney in South Carolina to represent Peter Ruben on this matter. I found that Randall Chastain, whom I had

known at Yale Law School, was an attorney in South Carolina, and that he was of counsel to the AV rated Columbia, South Carolina law firm of Lourie, Curlee, Barrett & Popowski. I called Randall Chastain on April 6 and April 7 of 1989, as shown by my telephone notes in my file, which I have reviewed. I did not reach Mr. Chastain with either of those telephone calls, but I left messages for him to call me back. On April 7, 1989 I wrote a letter to Peter Ruben (Exhibit B attached) giving Mr. Chastain's name and telephone number to Mr. Ruben.

(c) Randall Chastain first returned my telephone calls on April 8, but I missed his call. I returned his telephone call on April 10, and I missed him again. He then returned my telephone call that same day, namely on April 10, 1989, when we were first able to speak about this matter. I explained Peter Ruben's problem to Randall Chastain, and asked him if he would agree to represent Mr. Ruben with respect to vacating the default judgment against him in this case. Mr. Chastain told me in that conversation on April 10, 1989 that he would agree to represent Mr. Ruben, and that he would move to set aside the default judgment against Mr. Ruben. Mr. Chastain said that he would require a retainer from Mr. Ruben, which I told him Mr. Ruben was prepared to pay. I told Mr. Chastain that he should deal directly with Mr. Ruben on this matter, and that I would not be further involved.

(d) After this telephone call with Mr. Chastain on April 10, 1989 I called Peter Ruben and told him that Mr. Chastain had agreed to represent him with respect to setting aside the default judgment against him, and that Mr. Ruben should contact Mr. Chastain directly. Believing that Mr. Ruben would be adequately represented by Mr.

Chastain in South Carolina, and that he did not need to have two lawyers on this case, I had no further involvement nor did I monitor Mr. Chastain's work. I have no personal knowledge of when Mr. Ruben and Mr. Chastain first spoke about this case, but it was understood from my conversation with Mr. Chastain on April 10, 1989 that he would undertake the representation of Mr. Ruben to set aside the default. I have since seen a retainer letter dated May of 1989, in which Mr. Chastain acknowledges prior receipt of a retainer check from Mr. Ruben, and in which Mr. Chastain agreed in writing to represent Mr. Ruben with respect to this default judgment.

(e) I heard no more about this case until late November or early December of 1989, when Mr. Ruben called me to express concern that Mr. Chastain had not yet filed a motion to vacate the default judgment, and that Mr. Chastain was not returning Mr. Ruben's telephone calls and was not answering Mr. Ruben's letters. I then called Mr. Chastain several times, leaving messages with both his law firm office and his law school office, that he should call me to discuss this. Mr. Chastain did not return my phone calls. According to my file telephone notes, Peter Ruben called me on December 11, 1989, to say that he did finally receive a response from Mr. Chastain, and that Mr. Chastain had promised to proceed with this matter and to file a motion to vacate the default judgment.

5. I then heard no more about this matter until early August of 1990, when I learned for the first time that Mr. Chastain had not filed the motion to vacate the default judgment until March of 1990, more than eleven (11)

months after the date on which he agreed in his telephone call with me to represent Mr. Ruben and file the motion to vacate. In early August of 1990, Mr. Ruben told me that Mr. Chastain had just informed him that the motion to vacate the default judgment had been denied, but that Mr. Chastain had not yet provided him a copy of the Order denying the motion to vacate. Despite repeated requests, Mr. Chastain did not provide Mr. Ruben with a copy of this Court's order denying the motion to vacate the default judgment. I had to call the District Court directly and order a copy from the Court Clerk.

6. In early August of 1990, I called Mr. Chastain several times, again leaving messages at his office at the law school. Mr. Chastain did not return my telephone calls. I then wrote to Mr. Chastain, at both his law school address and his law firm address as taken from the Martindale-Hubbell legal directory. Attached hereto as Exhibit C is a true and correct copy of my letter to Mr. Chastain. Mr. Chastain did not respond in any way to my letter.

7. Based upon personal knowledge and involvement in this matter, at no time after receiving notice of the entry of the default judgment against him was Peter Ruben trying to evade his responsibilities to this Court. On the contrary, as shown by the facts stated above, Mr. Ruben and I, at Mr. Ruben's direction, moved diligently in hiring legal counsel to have this default judgment against him set aside.

DATED: September 24, 1990

By: /s/ Paul A. Stewart
PAUL A. STEWART

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

On this 24th day of September, 1990 before me Verna Cooperwood a Notary Public in and for the State of California personally appeared Paul A. Stewart, personally known to me on the basis of satisfactory evidence to be the person who executed the within instrument and acknowledged to me that he executed it.

[SEAL]

/s/ Verna Cooperwood
NOTARY PUBLIC

MY COMMISSION
EXPIRES 8-2-93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
NO. 2:88-1167-1

HOME PORT RENTALS, INC., Plaintiff, VS. THE INTERNATIONAL YACHTING GROUP, INC., A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE AND JIM EDWARDS, Defendants.	§ § § § § § § § § § §	AFFIDAVIT OF DENNY ALLEN
STATE OF TEXAS COUNTY OF DALLAS	§ § §	

PERSONALLY appeared before me Denny Allen, who being duly sworn, deposes and says:

1. He was formerly President of The International Yachting Group, Inc., and as such is familiar with the matters set forth herein.

2. The International Yachting Group, Inc. ("International Yachting") previously sold to Home Port Rentals in Hilton Head, South Carolina, three motor boat franchises and entered into three franchise boat lease agreements. The undersigned is familiar with Michael McEachern who was the President and principal operator of Home Port Rentals.

3. As a result of Home Port Rentals' failure to make certain leasing and/or franchise payments to International Yachting, the undersigned contacted attorney Robert A. Kasky in Hollywood, Florida, to notify Home Port Rentals it was in default under the franchise agreement and boat lease agreements. See notice of termination letter from Mr. Kasky to Mr. McEachern with Home Port Rentals dated June 16, 1986, attached hereto as Exhibit "A".

4. After Home Port Rentals received this letter, Home Port Rentals thereafter instituted a suit against International Yachting as well as Peter Ruben, Roger Moore, Jim Edwards and myself, in the United States District for the District of South Carolina, Charleston Division, in Civil Action No. 2:86-2141-1.

5. After that suit was instituted, the undersigned contacted Mikell Harper to represent all of the defendants.

6. The undersigned thereafter primarily handled the correspondence with Mr. Harper on behalf of International Yachting as well as the other defendants and attended the deposition of Mr. McEachern in Hilton Head, South Carolina.

7. At some point during the litigation, Mr. Harper informed the undersigned that the plaintiff was willing to dismiss the lawsuit against all defendants, and although the plaintiff had the right to reinstitute the suit, it was Mr. Harper's opinion it would be unlikely the suit would be reinstituted.

8. I remained employed at International Yachting and then Adventurent (all assets of International Yachting were sold to Adventurent in approximately March 1986) through July, 1987, when I moved to Keller, Texas, which is a suburb of the Dallas-Fort Worth, Texas area.

9. After I moved from Florida, Jan Gibson, who was also employed at International Yachting and has remained employed with Adventurent, has, to the best of the undersigned's knowledge, forwarded all business mail which was sent to me at my old business address with International Yachting (which is the same as Adventurent).

10. Ms. Gibson forwarded a letter from Mr. Harper to me dated November 3, 1987, relating to the lawsuit, a copy of which is attached hereto as Exhibit "B".

11. Mr. Harper stated in his letter that the lawsuit had been dismissed and although Home Port Rentals had the right to reinstitute it later, he did not believe Home Port Rentals would reinstitute the lawsuit which was consistent with my prior telephone conversation with him. After receiving this letter from Mr. Harper, I had a telephone conversation with Mr. Ruben and told him the contents of the letter.

12. Since I received Mr. Harper's letter dated November 3, 1987, I have never received any additional correspondence from Mr. Harper nor, to my knowledge, has he ever attempted to contact me by the telephone.

13. Had Mr. Harper tried to reach me by telephone at my old business telephone number in Fort Lauderdale with International Yachting, Ms. Gibson would have

either given him my telephone number in Texas or contacted me to say Mr. Harper had called and wanted me to return his call.

14. After receiving Mr. Harper's letter dated November 3, 1987, I never received a copy of the Consent Order (signed by Mr. Harper) dated November 4, 1987, nor did Mr. Harper ever advise me of the specific provisions contained in said Order other than the fact the plaintiff had the right to reinstitute the suit. I never authorized Mr. Harper to consent to an order allowing him to accept service of any refiled lawsuit on my behalf, or to waive any applicable statute of limitations or to waive the jurisdiction of the Florida court in the event the suit were reinstituted within 180 days.

15. I was never served with a copy of the reinstituted complaint which is Civil Action No. 2:88-1167-1, nor did Mr. Harper ever inform me such a suit had been reinstituted nor did I ever receive a copy of the complaint or the answer and counterclaim and motion to dismiss which Mr. Harper filed in the reinstituted action.

16. Since moving from Florida to Keller, Texas, in July 1987, after September 1, 1987, I continued to reside at the same residence which was located at 1519 Rockwood Drive, Keller, Texas 76748, until March 1990. My home telephone number has remained the same throughout this period of time, which is 817-498-0934, and my office telephone number has also remained the same during said period, 817-379-5282.

17. I never received a copy of the Rule to Show Cause dated September 23, 1988, attached hereto as Exhibit "C", until yesterday, September 25, 1990.

18. I did not receive a copy of the default judgment entered in this action until January 23, 1990. Since then, I have employed attorneys in Texas to consider whether to attempt to reopen the default judgment in South Carolina or the State of Texas.

19. Prior to the lawsuits by Home Port Rentals, I had never been personally sued in my individual capacity.

SWORN TO before me this 26 day of September, 1990.

/s/ Patrick Lawrence Million
Notary Public for Texas

/s/ Denny Allen
Denny Allen

My commission expires: June 18, 1994

[Seal]

EXHIBIT "A"

LAW OFFICES

ABRAMS, ANTON, ROBBINS, RESNICK,
SCHNEIDER & MAGER, P.A.

ILLEGIBLE STREET
HOLLYWOOD, FLORIDA 33020

BOCA BANK BUILDING •
SUITE 200
855 SOUTH FEDERAL HIGHWAY
BOCA RATON, FLORIDA
33432-6133

[Letterhead illegible]

JUN 17 1986

June 16, 1986

Mr. Michael McEachern
Home Port Rentals, Inc.
Club Nautico of Hilton Head
Post Office Box 533
Beauford, South Carolina 29901

Dear Mr. McEachern:

This firm represents The International Yachting Group, Inc. While I have reviewed the extensive and, I might add, very entertaining correspondence flowing from you to my client (typically in response to a demand for money), I have also revisited the terms and conditions under which you acquired your franchise rights and it is my conclusion that my client, The International Yachting Group, Inc., is within its legal rights to enforce the termination provisions of Article 11 of the Franchise Agreement between IYG and Home Port Boat Rentals, Inc.

Based on the letters you have written, it's clear to me that you fully comprehend the ramifications of a franchise termination. Your correspondence clearly indicates that

you are an intelligent person who can grasp the concepts contained in such legal documents. While IYG regrets having to take this action, it is being taken after numerous efforts, to no avail, to give you the opportunity to rehabilitate yourself insofar as contractual compliance is concerned. You have evidently elected not to adhere to your contractual obligations and IYG has, therefore, retained this firm to proceed to franchise termination.

You are, therefore, notified that, pursuant to Article 11 of the Franchise Agreement, your franchise is terminated due to the breach by you of numerous sub-sections of Article 11.02 of the Agreement. In particular and not by way of limitation, we are alleging a breach of Article 11.02(b), (e), and (g). You are, therefore, hereby instructed to cease using any and all names associated with IYG, Adventurent and, but not limited to, Club Nautico. Pursuant to Article 11.03, you are to forthwith cease and desist from using any marks owned by IYG or advertising materials referencing their name. You are to return all documentation referred to in Section 11.03 to the franchisor at once. As required by Article 11.07, you are to remit the following sums to my client at once:

Hilton Head franchise – $5,227.97 for parts
$11,302.70 lease payments
$929.06 insurance
Adjusted to reflect $3,000 payment
Total due – $14,459.73

As to Charleston
$592.25 – insurance

As to Melbourne
$828.99 for parts
$381.37 for insurance

$93.20 credit.

Accordingly, based on the above, a check in the amount of $16,169.14 should be remitted at once.

Please let me remind you that the termination process also entails restrictive covenants which were agreed to by you in the Franchise Agreement and which will be enforced by my client.

This termination notice deals with all three of your franchises and each is deemed to be included herein.

Our client will take appropriate steps to obtain assurances that you have complied with the termination provisions of the Franchise Agreement. It has informed us that it will vigorously enforce its rights.

Please consider this letter as a termination not only of the three franchises currently operated by you but of the applicable Franchise Boat Lease Agreements to which you are a party.

Someone from IYG or Adventurent, Inc. will contact you soon to oversee the winding down of your operation.

In the meantime, please call should you or your counsel wish to discuss this matter further.

Sincerely yours,

ABRAMS, ANTON, ROBBINS, RESNICK,
SCHNEIDER & MAGER, P.A.

By: _____
Robert A. Kasky

RAK:JC

cc: Mr. Denny Allen
Ms. Veronica Harvey
Mr. Roger Moore

EXHIBIT "B"

LAW OFFICES

HARPER AND HARPER

OFFICE:

1611 NORTH STREET •
BEAUFORT, S.C. 29902
(803) 524-8595
P.O. BOX 1121

F. MIKELL HARPER

FRAMPTON L. HARPER
OF COUNSEL

(803) 842-5243
HILTON HEAD ISLAND, SC 29938

November 3, 1987

Mr. Denny Allen
International Yachting Group
Siute [sic] 106
5450 Northwest 33rd Avenue
Fort Lauderdale, Florida 33309

RE: Home Port Rentals, Inc. v. International Yachting, et al.

Dear Mr. Allen:

This is to advise you that the above referenced suit against International Yachting Group has been dismissed by the Federal Court. This dismissal is of the kind that McEachern does have the right to bring the suit again, but in all honesty, I do not expect that to happen. If it

does, however, I will let you know and keep you posted on developments in this matter.

I am glad that so far, things seem to be going well, and that I believe that there is no further action on my part. Also, enclosed please find our bill for services rendered in the matter. It was a pleasure working with you, and if you should need assistance in this or any other matter in the future, please do not hesitate to contact me.

Thanking you, and with best wishes, I am

Yours very truly,

F. Mikell Harper

FMH/jch
Enclosure

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
No. 2:88-1167-1

HOME PORT RENTALS, INC., Plaintiff, vs. THE INTERNATIONAL YACHTING GROUP INC., A Florida Corporation, PETER RUBEN, DENNY ALLEN, ROGER MOORE AND JIM EDWARDS, Defendants.	)	SUPPLEMENTAL AFFIDAVIT OF PETER RUBEN
STATE OF CALIFORNIA COUNTY OF MARIN	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. That he was Chairman of the Board of The International Yachting Group, Inc. and at the time it ceased all operations at the end of 1986, he owned approximately thirty five (35%) percent of the stock in International Yachting.

2. At the time Adventurent, Inc. acquired the assets of International Yachting on April 1, 1986, Adventurent continued to do business at the same office formerly occupied by International Yachting in Dania, Florida. In December, 1986, Adventurent moved its offices to Fort Lauderdale, Florida and has continued to operate out of

the same business address since the move from Dania which is 5450 Northwest 33rd Avenue, Suite 106, Fort Lauderdale, Florida 33309.

3. After the suit was instituted by Home Port Rentals, International Yachting vigorously contested the lawsuit and filed a counterclaim for monies which were due by Home Port Rentals to International Yachting under the franchise and leasing agreements. As evidenced by the termination letter from Attorney Kasky to Home Port Rentals, dated June 16, 1986, (a copy of which is attached to Denny Allen's affidavit), International Yachting was also claiming monies due from Home Port Rentals in addition to terminating the franchise agreement and franchise leasing agreement.

4. The undersigned also recalled that at some point after Denny Allen received Attorney Mikell Harper's letter dated November 3, 1987 stating the case has been dismissed, Mr. Allen called me and either read the letter over the telephone or informed me of its contents. As I have also stated in my affidavit of February 5, 1990, I had also been informed that any remaining disputes had been settled by Outboard Marine Corporation which was a stockholder in Adventurent (Adventurent having purchased most of the assets in International Yachting Group). Based upon Mr. Harper's letter of November 3, 1987, it appeared the lawsuit by Home Port Rentals would not be reinstituted and I had no further reason to be concerned about the lawsuit or monitor the proceedings since Mr. Harper said the suit was dismissed and it was his opinion it would not be reinstituted.

5. If Mr. Harper or plaintiff's counsel had wanted to serve me and/or contact me, this could have easily been accomplished as set forth in my prior affidavit, my address in Florida was the same from August, 1986 through August, 1988 (581 Lake Dasha Boulevard, Plantation, Florida). Had Mr. Harper attempted to contact me by letter or telephone he could have easily done so. After I moved to Mill Valley, California in September, 1988, my address has continued to be the same (through the present) which is 4 Stanton Way, Mill Valley, California 94941.

6. I never received a copy of the consent order dated November 4, 1987 which dismissed the prior action without prejudice. As already stated in my prior affidavit, I never authorized attorney Mikell Harper to accept service of any reinstituted suit on my behalf nor to waive any statute of limitations or matters relating to jurisdiction.

7. I have never been served with a copy of the summons and complaint in the reinstituted action, Civil Action No. 2:88-1167-1 nor did I ever receive a copy of the summons and complaint from Mr. Harper or anyone else, nor did Mr. Harper ever furnish me with a copy of the answer and counterclaim or his motion to dismiss.

8. I never received a copy of the Rule to Show Cause and Order dated September 23, 1988, Exhibit "A" nor was I aware the Rule to Show had been published in a newspaper in Florida.

9. At the time the notice was published in The Sun-Tattler on October 4, 1988, I was residing in Mill Valley,

California and had been so for over one month. Furthermore, The Sun-Tattler was a paper published in Hollywood, Florida with limited circulation as opposed to the Sun Sentinel newspaper which is published in Fort Lauderdale and has a much greater general circulation.

10. I did not receive the Order for Default Judgment dated March 16, 1989 (and filed March 17, 1989) until April 1, 1989. As stated in my prior affidavit, it was forwarded to me from Florida to California. I immediately contacted my attorney Paul Stewart in San Francisco as is evidenced by my fax transmission to him on April 3, 1989. I also asked Mr. Stewart to assist me in contacting an attorney in South Carolina for the purpose of representing me in having the default judgment set aside.

11. Mr. Stewart contacted Randall Chastain, Esquire of Columbia, South Carolina and I first spoke with Mr. Chastain during the week of April 10, 1989. Mr. Chastain told me he would represent me in having the default judgment set aside.

12. On May 8, 1989 I sent Mr. Chastain a retainer check of $2,500.00 and signed a retainer agreement with Mr. Chastain on May 13, 1989, a copy of which is attached as Exhibit "B".

13. For reasons unknown to me, Mr. Chastain delayed filing a motion to set aside the default judgment until March 13, 1990 which was over ten (10) months after I had retained him to represent me and paid a retainer. On November 10, 1989, Mr. Chastain wrote me a letter stating part of the delay had been caused by his father's

death and dislocation caused by Hurricane Hugo. See a copy of Mr. Chastain's letter attached as Exhibit "C".

14. Once I had contacted and retained Mr. Chastain, I felt he was taking such actions as were necessary and proper to relieve me of the default judgment. Mr. Chastain also told me the Federal Rules allowed someone up to one year to have the default set aside.

15. Prior to the institution of the suit by Home Port Rentals, I had never been sued in my individual capacity.

SWORN to before me this 27th
day of September, 1990.

/s/ Anna M. Merrill (L.S.)
Notary Public for California
My commission expires: 1/10/94

/s/ Peter Ruben
Peter Ruben

[seal]

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF BEAUFORT	)	AFFIDAVIT OF
	)	F. MIKELL HARPER
Home Port Rentals, Inc.,	)	
	)	C/A No. 2:88-1167-1
Plaintiff,	)	
	)	
vs.	)	
	)	
The International Yachting Group, Inc., a Florida Corporation, Peter Ruben, Denny Allen, Roger Moore, and Jim Edwards,	)	
	)	
	)	
	)	
	)	
	)	
Defendants.	)	

The undersigned, being duly sworn, deposes and says:

1. He previously represented the above named defendants in two separate actions pending in the U.S. District Court for the District of South Carolina, Charleston Division. Each of the suits had the identical caption as shown above and the civil action numbers were 2:86-2141 and 2:88-1167-1.

2. The first suit against the defendants was dismissed without prejudice by a consent order dated November 4, 1987.

3. When the suit was reinstituted (See C/A 2:88-1167-1), I wrote the defendant Denny Allen, by certified mail, a letter pleading which I filed on behalf of all of the defendants. This letter was returned to me unopened.

4. My secretary also tried to contact the defendants at their prior business address in Fort Lauderdale, Florida which was then being operated by Adventurent. The persons she spoke with were generally uncooperative and would not provide her with any assistance in locating my clients.

5. During the course of the reinstituted lawsuit (and to the best of my recollection during the first lawsuit also) I never had any contact or correspondence with Mr. Ruben.

6. While I understand Mr. Allen and Mr. Ruben knew the first suit was being dismissed and could be reinstituted, in retrospect and from an examination of my file, it appears that neither Mr. Ruben nor Mr. Allen were made aware of the fact Home Port Rentals, Inc. had, in fact, reinstituted the lawsuit.

/s/ F. Mikell Harper
F. Mikell Harper

SWORN to before me this 16
day of January, 1991.

Illegible (L.S.)
Notary Public for South Carolina
My Commission Expires: 11-10-97

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
C/A #: 2:88-1167-1

HOME PORT RENTALS, INC., Plaintiffs, vs. INTERNATIONAL YACHTING GROUP, INC., A Florida CORPORATION, PETER RUBEN, DENNY ALLEN, ROGER MOORE, AND JIM EDWARDS, Defendants.	)	AFFIDAVIT OF MICHAEL J. McEACHERN

I, Michael J. McEachern, upon being duly-sworn, hereby state and depose as follows:

(1) I was the President and a substantial stockholder in Home Port Boat Rentals, Inc.

(2) Due to the misconduct of the Defendants in taking funds from our stockholders and me in the fraudulent "Club Nautico" franchise scheme, our company was unable to pay its employees, taxes, trade debt, and other creditors; and the company is now defunct. I lost practically everything I had in Home Port; and I am presently in bankruptcy preceeding [sic] because of the Defendants' fraud. Several of the other stockholders of Home Port have lost their life-savings and have incurred substantial financial hardships and debt as a result of being swindled by the Defendants.

(3) The Defendants' complaint about potential ill-effects of the judgment on them appalls me. The victims in this case are the stockholders of Home Port who trusted the Defendants and lost their funds and face constant creditors' actions and bankruptcy.

(4) I have attempted to locate all of the Defendants in this matter before, during, and after the litigation; and, fortunately, I located Mr. Allen in Texas and Mr. Ruben in California. I have been unable to locate the other Defendants; and Defendants Allen and Ruben have been of no assistance to us in locating them.

(5) I feel it would be grossly unfair to force the Plaintiff to litigate the case after the lapse of several years due to the delays of the Defendants. A key witness would have been Edward Wilcox, III, who was the controller of Home Port in charge of maintaining all of the financial records and documents of the company. In addition, Mr. Wilcox had numerous conversations with the Defendants during his employment with us which would be critical to prosecuting the case. However, I have attempted to locate Mr. Wilcox, who is no longer employed with Home Port, during the last few years and have been unsuccessful. Mr. Wilcox would be an extremely important witness at the trial in favor of our case.

(6) In addition, Mr. Wilcox was in charge of maintaining the financial records and documents of the company; and, since his disappearance, I have been unable to locate these records. Accordingly, we would be forced to litigate the case without two (2) key Defendants, a key witness for the Plaintiff and important documents necessary to properly present the case.

(7) In addition, because Home Port no longer conducts business due to the misconduct of the Defendants, it would be virtually impossible to reconstruct all of the documents, to locate all of the other witnesses from several years ago, to precisely recall all of the facts in the case, and to discover facts and documents from other persons to present at trial.

(8) On behalf of all of us involved in the Home Port venture, I would respectfully request that the Court not punish us and reward the Defendants in vacating the Default Judgment in this matter. These matters have been continuing for several years when the case should have already been resolved and the judgment paid. The Defendants have hidden long enough to make presentation of our case almost impossible.

/s/ Michael J. McEachern
MICHAEL J. McEACHERN
INDIVIDUALLY AND ON
BEHALF OF HOME PORT
AS PRESIDENT

SWORN to BEFORE me
this 3rd day of February, 1991.

/s/ Phyllis C. Corbin (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 1995

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

Nos. 91-1892, 92-25

In The

Supreme Court of the United States

October Term, 1992

PETER RUBEN,

Petitioner,

vs.

HOME PORT RENTALS, INC.,

Respondent.

DENNY ALLEN,

Petitioner,

vs.

HOME PORT RENTALS, INC.,

Respondent.

Petitions for Writs of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the finding by the District Court that it had personal jurisdiction of Peter Ruben and Denny Allen thereby denying them due process of law?

2. Did the Court of Appeals err in affirming the refusal of the District Court to vacate the default judgment under Rule 60(b) Fed.R.Civ.P. entered against Peter Ruben and Denny Allen and in not finding that its failure to do so was an abuse of discretion?

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STATEMENT OF THE CASE

In August, 1986, Home Port Rentals, Inc. ("Home Port" or "Plaintiff"), filed a lawsuit against International Yachting Group, Inc. ("IYG" or "Defendant"), Peter Ruben ("Mr. Ruben" or "Defendant"), Denny Allen ("Mr. Allen" or "Defendant"), Roger Moore, and Jim Edwards alleging breach of contract, common law fraud, and violation of the South Carolina securities laws arising out of the sale of three (3) motor boat franchises and three (3) boat lease agreements between Home Port and IYG. (App., pp. 42-51). Mr. Ruben was IYG's chairman of the board and Mr. Allen its president. (App. p. 3). Mikell Harper, Esquire ("Mr. Harper"), timely filed an Answer and Counterclaim on behalf of all the Defendants. On October 30, 1986, Mr. Harper filed a First Amended Answer and Counterclaim, as well as a Motion to Dismiss and Supporting Memorandum.

On November 4, 1987, by consent of counsel for all parties, the Honorable Falcon B. Hawkins, United States District Judge for the District of South Carolina, signed a Consent Order granting the Plaintiff a voluntary non-suit without prejudice, stipulating in part timely reinstitution of the Plaintiff's claims would subject the Defendants to the court's jurisdiction and Mr. Harper would be authorized as the Defendants' agent in South Carolina to accept service of process. The Consent Order was dated November 4, 1987, filed on November 13, 1987, and entered on November 17, 1987. (App., p. 39). In accordance with the Consent Order, Home Port reinstituted suit against the same Defendants, including Mr. Ruben and Mr. Allen, on May 4, 1988, through service of the Summons and Complaint upon Mr. Harper. (App., p. 58). On May 26, 1988,

Mr. Harper again filed an Answer, Counterclaim, and Motion to Dismiss on behalf of the Defendants in response to the Plaintiff's pleadings. (App., pp. 4, 21, 60).

Due to the Defendants' uncooperative behavior, Mr. Harper filed a motion to withdraw as counsel on August 2, 1988. (App., p. 62). On August 25, 1988, Judge Hawkins held a hearing on Mr. Harper's motion to withdraw; and he issued a Rule to Show Cause and Order to all Defendants on September 23, 1988. The rule to show cause hearing was held on October 26, 1988. (App., p. 81). Following the hearing, Judge Hawkins issued an order relieving Mr. Harper as Defendants' counsel. (App., p. 86). Subsequently, on October 31, 1988, Judge Hawkins issued an order striking the Defendants' responsive pleadings with prejudice and holding them in default for failure to cooperate in discovery matters. (App., p. 86).

On March 17, 1989, after taking testimony on the matter, Judge Hawkins issued an order awarding the Plaintiff One Million Two Hundred Thousand Dollars ($1,200,000) actual damages and Fifty Thousand Dollars ($50,000) punitive damages against all Defendants. (App., p. 97). Judgment was entered on March 20, 1989; and Defendant Ruben personally received a copy of the default judgment from the court on April 1, 1989. (App., p. 136).

On May 13, 1989, Mr. Ruben entered into a retainer agreement with Randall Chastain, Esquire ("Chastain"), his second South Carolina attorney. (App., p. 100). Mr. Chastain was to represent Mr. Ruben in seeking to have the default judgment set aside. Approximately eleven (11) months later, on March 14, 1990, Mr. Chastain filed a

motion to vacate the default judgment pursuant to rule 60(b) of the Federal Rules of Civil Procedure. (App., p. 136). On July 18, 1990, Judge Hawkins entered an order denying Mr. Ruben's motion to vacate the default judgment, citing neglect and dilatory behavior. (App., pp. 24-25).

On August 15, 1990, Mr. Chastain filed a motion to reconsider the denial of the motion to vacate. (App., p. 27). In September, 1990, Mr. Ruben retained T. English McCutheon, III, Esquire, and Ronald James Tryon, Esquire, as his third and fourth South Carolina counsel. On November 27, 1990, more than one (1) year after its entry, Mr. Allen also filed a companion motion pursuant to Rule 60(b)(6) to vacate the default judgment against him. (App., p. 27). On May 2, 1991, following a hearing on the matter and review of the pleadings and documents before him, Judge Hawkins entered an order denying Mr. Ruben's motion to reconsider and Mr. Allen's motion to vacate. (App., pp. 27-31).

Mr. Ruben and Mr. Allen timely filed notices of appeal from Judge Hawkins' orders entered on April 30, 1991. On June 11, 1991, the United States Court of Appeals for the Fourth Circuit consolidated these cases for review. In an opinion dated February 25, 1992, the Fourth Circuit affirmed the trial court. A Petition for Rehearing in the appellate court was denied on March 23, 1992.

The plaintiff here diligently and correctly pursued its lawsuit against Mr. Ruben and Mr. Allen throughout the long and tortured history of this matter. On the other hand, Mr. Ruben and Mr. Allen were uncooperative

towards the Plaintiff, the district court, and Mr. Harper throughout the proceedings, thereby making the task of their chosen counsel difficult, if not impossible. The Plaintiff was awarded a substantial default judgment, which judgment Mr. Ruben and Mr. Allen attack as being the result of "blatant lawyer negligence." Mr. Ruben and Mr. Allen should not be allowed to chronically shift the blame for their dilatory or inattentive behavior upon their several attorneys in a last ditch effort to avoid financial responsibility owed to the Plaintiff for their misconduct. Moreover, the Plaintiff, who pursued its lawsuit diligently and complied with each and every order of the court, should not be stripped of its default judgment.

On August 13, 1986, Home Port filed suit in the District Court for the District of South Carolina against IYG, Mr. Ruben, Mr. Allen, and two of IYG's employees, Roger Moore and Jim Edwards. The summons and Complaint were served by certified mail on all defendants at IYG's corporate address, 302 Lewis Lane, Dania, Florida 33304 (App., pp. 34, 35). There was evidently no difficulty with acceptance of service of process at that time. Mr. Allen, who was president of IYG, traveled to Beaufort, South Carolina, to discuss the lawsuit with Mikell Harper, Esquire. Mr. Allen paid Mr. Harper a retainer and entered into an agreement with him on behalf of all the Defendants. Mr. Allen thereafter acted as the spokesman for all the Defendants in their joint representation by Mr. Harper. (App., pp. 28, 29, 102).

IYG had sold its assets to Adventurent, Inc., in March, 1986. (App., pp. 29, 125). Adventurent, as the successor corporation to IYG, had as its stockholders both Mr. Ruben and Mr. Allen. (App., p. 13). Adventurent and

IYG operated from the same Florida address through December, 1986, when Adventurent moved to Ft. Lauderdale, Florida. (App., p. 133).

During late 1987, Home Port's counsel and Mr. Harper on behalf of the Defendants agreed to dismiss the lawsuit without prejudice premised upon certain conditions proffered by the Plaintiff. This agreement arose partially due to Mr. Harper's difficulty attaining cooperation from the Defendants to participate in the trial. As an accommodation to Mr. Harper and his clients, as well as in response to his motion to dismiss, the parties agreed upon a voluntary non-suit without prejudice. On October 29, 1987, Home Port's counsel drafted a proposed Consent Order and sent it to Mr. Harper by letter dated October 29, 1987. (App., p. 36). The Consent Order provided that in the event Plaintiff reinstituted its lawsuit within "180 days" the Defendants would voluntarily submit themselves to the jurisdiction of the court and waive any statute of limitations defense. Moreover, the Order provided Mr. Harper would accept service of process for all Defendants, including Mr. Ruben and Mr. Allen, provided that the proceedings were commenced within the 180 day time limit. (App., p. 39).

By letter dated November 3, 1987, Mr. Harper advised Mr. Allen of the voluntary dismissal of the Home Port lawsuit. The letter to Mr. Allen reflects that there was an enclosure with the letter; and Mr. Harper represented to the court that he forwarded a copy of the Consent Order to the Defendants. (App., p. 4). In his capacity as spokesman for the Defendants, Mr. Allen contacted Mr. Ruben to inform him of the contents of Mr. Harper's November 3, 1987, letter. (App., p. 134). In

addition, the November 3, 1987, letter mailed to Mr. Allen at IYG's corporate address was forwarded to him by Jan Gibson, the receptionist for Adventurent. (App., pp. 28, 29, 125). Mr. Allen had apparently moved to Keller, Texas, without informing his attorney that he had done so.

Although the November 3, 1987, letter received by both Mr. Ruben and Mr. Allen was sent by Mr. Harper to what the Defendants contend is an improper address, neither "cooperative" Defendant corrected Mr. Harper's glaring error. Moreover, the letter, which discusses the dismissal and notes an enclosure, states "I do not expect that (refiling and reservicing) to happen, I will let you know and keep you posted on developments." (App., p. 37). Unless Mr. Harper was knowingly authorized to accept process on behalf of the Defendants in accordance with the Consent Order, about what would he know upon which to keep them posted? Common sense and logic dictate the conclusion the Defendants, including Mr. Ruben and Mr.. Allen, authorized the agency arrangement, failed to notify Mr. Harper as their agent of the relocation, received the mail at the Florida address which they wanted to receive, and hoped their "unavailability" would discourage the Plaintiff and shield them from execution upon any potential judgment.

On May 4, 1988, well within 180 days of the effective date of the consent Order, Home Port reinstituted suit against the Defendants. (App., p. 58). Pursuant to the terms of the Consent Order, Mr.. Harper accepted service of process for all Defendants. (App., pp. 58, 63).

On May 25, 1988, Mr. Harper sent a registered letter to Mr. Allen at the corporate headquarters for IYG,

enclosing copies of the Complaint, the Answer and Counterclaim, the Motion to Dismiss, and the Supporting Memorandum. (App., pp. 60, 69). Mr. Harper asked that Mr. Allen call him "immediately" and provide him with Mr. Allen's new address and telephone number. (App., p. 60). Although sent to the same address effective six (6) months earlier, this letter was returned to Mr. Harper with a notation that Mr. Allen was no longer at that address and his whereabouts were unknown. (App., p. 68).

Mr. Harper, through his secretary, tried to contact the Defendants at their prior business address in Ft. Lauderdale, Florida, which was then being operated by Adventurent. Mr. Harper received no assistance from the persons with whom his secretary spoke and found them to be "generally uncooperative." (App., pp. 4, 29). The May 25, 1988, registered letter was sent to the same address as the November 3, 1987, letter, in which Mr. Harper notified Mr. Allen of the dismissal of the first lawsuit. There is no question that Mr. Allen received the November 3, 1987, letter; but for some reason, the May 25, 1988, certified letter sent to him at the same address, the same as IYG's successor corporation, Adventurent, was returned to him unopened. Mr. Allen chose not to inform Mr. Harper of his relocation; and no one at Mr. Allen's business was willing to tell him any correct address.

On August 2, 1988, Mr. Harper filed a motion to withdraw as counsel for the defendants. (App., p. 24). In the memorandum in support of his motion to withdraw, Mr. Harper stated that the whereabouts of the Defendants were unknown to him and he had made an "exhaustive

and diligent search for them." (App., p. 24). Mr. Harper had, in fact, tried to contact his clients by certified mail, telephone communications, and through contacting another attorney who was representing Adventurent, the successor business to IYG in which the Defendants were principals. In fact, Mr. Harper had discussed the specific terms of the Consent Order with Mr. Allen, the spokesman for all the defendants; and there is no evidence Mr. Allen objected to any of the terms of the Consent Order. Moreover, after the Consent Order was entered, a copy of the Order was sent to Mr. Allen through regular, uncertified mail with an accompanying letter, the contents of which were discussed with Mr. Ruben; and the letter was never returned undelivered to Mr. Allen. (App., pp. 67-68). The defendants received the mail which they wanted to receive.

The issue of the unavailability of Mr. Harper's clients was fully aired before Judge Hawkins on August 25, 1988. (App., p. 65). Mr. Harper informed the court that the Consent Order had been mailed to the Defendants; and the mailing containing the Consent Order had not been returned. (App., pp. 67-68). The Defendants were certainly aware of the prospects of a new proceedings; and Mr. Harper made numerous and diligent attempts to inform them of the actuality of that proceedings.

On September 23, 1988, the court filed its Rule to Show Cause as to why a default judgment should not be entered against the Defendants. (App., p. 79). The Rule was served by the court through registered mail on each of the Defendants as their last known address. (App., p. 82). As insurance, Judge Hawkins directed Home Port's counsel to publish the court's Rule and Order in a local

newspaper of general circulation in Florida at the defendants' last known address. On October 4, 1988, Home Port's counsel had the Rule and Order published in a Broward County, Florida, weekly newspaper called "The Sun-Tattler." (App., pp. 82, 87). The publication was done in addition to the certified mailing by the court; and notice through publication was not the sole method the Plaintiff or court attempted to apprise the Defendants of the Rule and order. From the poor quality of copies in the record one cannot decisively tell whether attempted service by the court upon the Defendants was successful noticing the October 25, 1988, hearing. However, more important, in focusing the issue of the Defendants' credibility in contending certified mailings were not *intentionally* evaded, is the clarity of the addresses incorporated by the Court. Did the same address work sometimes while not at others; and, if not, why? The Court of Appeals agreed with the district court findings that Mr. Ruben intentionally evaded contacts from the court and Mr. Harper.

The rule to Show Cause hearing was held on October 24, 1988; and neither Mr. Harper nor any of the Defendants was present. (App., pp. 5, 81). On October 26, 1988, Judge Hawkins issued his Order relieving Mr. Harper as counsel for the Defendants. (App., p. 5). The court instructed Home Port's counsel to submit a proposed default order. (App., p. 84).

On October 31, 1988, Judge Hawkins issued an order holding the Defendants, including Mr. Ruben and Mr. Allen, in default for failing to participate in discovery, refusing to submit to depositions, and failing to participate in the prosecution and defense of the lawsuit. (App.,

pp. 5, 86). Judge Hawkins also struck the Defendants' counterclaim with prejudice and held the Defendants jointly and severally liable for actual and punitive damages. (App., pp. 87).

On March 1, 1989, a hearing on the default judgment was held at which counsel for Home Port and representatives of Home Port were present. Mr. McEachern testified that Home Port had suffered actual damages in the amount of $381,483.47 as a result of the Defendants' breach of contract. (App., p. 91). Mr. McEachern further testified about Home Port's damages as a result of the fraudulent misrepresentations made to it by the Defendants concerning the franchise agreements. Mr. McEachern testified that the Defendants had represented that Home Port could expect in excess of $20,000 a month in profits during the initial five-year life of the franchise agreement and through the three five-year renewal options. Based upon the specific representations of the Defendants, Mr. McEachern calculated Home Port lost profits in the amount of $1,200,000. (App., pp. 92-93). Mr. McEachern further testified that Home Port had been advised that the Club Nautico investment concept was tried and proven with many other investors, none of whom had ever lost money "even for so much as a month." It was an appealing investment to Home Port because the company was involved in boat rentals. As a result of the false representations made to Home Port inducing the investment, Mr. McEachern stated Home Port lost $381,000. (App., p. 93). On March 16, 1989, Judge Hawkins issued an Order awarding the plaintiff $1,200,000 in actual damages and $50,000 in punitive damages against all the Defendants. (App., pp. 97-99).

On March 23, 1989, the district court sent a copy of the Order of Judgment by registered mail to Mr. Ruben at the Lewis Lane, Dania, Florida, address. Interestingly, the letter was accepted on Mr. Ruben's behalf by Mr. Skoglund, husband of the former controller of IYG, who lived next door to the former offices of IYG in Dania, Florida. (App., p. 104). It is curious that Mr. Ruben has characterized the certified letter to him as "misdelivered" (App., p. 104) when no other certified letters sent to the Defendants were so misdelivered. Mr. Skoglund forwarded the letter to Mr. Ruben at his Mill Valley, California, address where it was received by Mr. Ruben on April 1, 1989. (App., pp. 5, 112).

On March 14, 1990, Mr. Chastain filed a motion to vacate the default judgment. (App., pp. 20, 108). Judge Hawkins heard this motion on July 10, 1990. The issues were extensively presented to Judge Hawkins orally and in written form; and, on July 17, 1990, Judge Hawkins denied Mr. Ruben's motion to vacate the default judgment. Mr. Ruben raised no issue about any miscalculation or improper distribution of damages amongst the Defendants. (App., pp. 20-26).

It is uncontradicted that Mr. Ruben received actual notice of the default judgment in early April, 1989, well within the appeal period. Notwithstanding this prompt notice of the default judgment, as well as his alleged concern with the quality of Mr. Harper's and Mr. Chastain's representation, a motion to vacate the default judgment was not filed until nearly one (1) year after entry. The court found this to show that Mr. Ruben did not act with due diligence. (App., p. 23).

On November 30, 1990, a hearing was held before Judge Hawkins on Mr. Allen's motion to vacate and Mr. Ruben's motion to reconsider. (App., p. 27). With execution upon a substantial judgment facing them, not only was Home Port's counsel present, but so too were counsel for Mr. Ruben and Mr. Allen. After hearing extensive arguments on the issues and considering the entire record, Judge Hawkins denied the motions. (App., pp. 27-31). Judge Hawkins exercised his discretion not to penalize the blameless Plaintiff for the sins of omission or commission of the Defendants and their attorneys. It was an appropriate allocation of fault and a proper exercise of Judge Hawkins' discretion in this matter; and the Court of Appeals appropriately affirmed the trial court rulings of Judge Hawkins.

SUMMARY OF ARGUMENT

The Supreme Court ought to deny the petitions of Mr. Ruben and Mr. Allen for the following reasons:

(1) Rule 10 of the Rules of the Supreme Court in relevant part states a "petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The decision of whether to vacate a default judgment rests with the sound judicial discretion of the district court. The well-reasoned, detailed opinion of the Fourth Circuit Court of Appeals affirmed the discretionary ruling based upon reasonable factual determinations of the district court as not constituting abuse of discretion. The decision of the appellate court affirming the district court does not "conflict with the decision of

another United States Court of Appeals on the same matter" and is consistent with "accepted and usual course of judicial proceedings." Accordingly, the discretionary ruling of the district court affirmed by the appellate court should stand; and the petitions ought to be denied.

(2) It is well-established that questions unraised in the lower courts should not be under consideration in proceedings on petitions on certiorari. *Ellis v. Dixon*, 75 S.Ct. 850, 349 U.S. 458, 99 L.Ed. 1231, *rehearing denied* 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759. However, significant portions of each petition assert damage miscalculations and errors of distribution of the judgment amount amongst the responsible parties by the district court. *See* Ruben Petition, Question 2, ¶B, pp. 28-30 and Allen Petition, Question 2, ¶A, pp. 23-26. The petitions ought not be the original source of these recently formed arguments not raised below at the trial or appellate court levels. Accordingly, this joint brief in opposition does not specifically address whatever substantive issues Mr. Ruben and Mr. Allen raise concerning the judgment amount or its intra-defendant distribution; and the petitions should be denied.

(3) The petitioners contend requisite due process requires actual personal service upon them as a fundamental prerequisite to entry of the default judgment in this matter. However, the district and appellate courts disagree with the petitioners' interpretations of due process.

The terms of the consent order premise dismissal of Home Port's original action upon the agreement of Mr.

Ruben and Mr. Allen to waive any objections to the court's assertion of personal jurisdiction upon them and to authorize F. Mikell Harper, Esquire, their attorney, to receive service of process on their behalf. The Court of Appeals states there is "ample support for the district court's finding that Harper was authorized to act on behalf of the defendants in entering into the consent agreement and accepting service on the defendants' behalf." Mr. Harper was the court-appointed agent of Mr. Ruben and Mr. Allen for the specific purpose of accepting service of process; and the due process interests of the petitioners were met in accordance with the specific dictates of their requirements in the consent order. Accordingly, the petitions should be denied.

(4) Mr. Ruben and Mr. Allen in the alternative complain any waiver of defenses included within their consent agreement was ineffective because Home Port failed to reinstitute the lawsuit "no later than 180 days from the date" of the consent order. The petitioners contend the reinstitution of the lawsuit occurred more than 180 days from November 4, 1987, the date on which the court signed the consent order. The district court found that "the relevant date for computation of time is the date the order was filed in the Clerk of Court's Office, November 13, 1987." Under the district court's interpretation of the consent order, Home Port refiled its action 172 days after the consent order was filed; and the refiling was timely.

It is peculiarly within the province of the district court to determine the meaning of its own order. *Kendrick v. Peteres*, 931 F.2d 421 (6th Cir. 1991). The district court did not abuse its discretion in interpreting its own order. Accordingly, the petitions should be denied.

(5) Mr. Ruben and Mr. Allen contend the Court of Appeals erred in affirming the district court did not abuse its discretion refusing to vacate the judgment rendered against them. Mr. Ruben and Mr. Allen waited a few weeks less than a year and approximately twenty (20) months, respectively, following actual notice of the judgment rendered against them, before filing motions to vacate the judgment. The petitions rely upon Rule 60(b) for relief asserting the district court abused its discretion refusing to vacate the judgment. However, Rule 60(b) requires substantially more effort and good faith than exerted by Mr. Ruben and Mr. Allen. The Court of Appeals affirmed the district court finding that "Ruben purposely did not inform the district court of his whereabouts for the ulterior motive[ ] of avoiding process" and he "apparently did receive correspondence when he wished."

Mr. Allen moved for relief from the default judgment on the same facts underlying Mr. Ruben's Rule 60(b)(1) motion. However, given the lapse of more than one (1) year, Mr. Allen couched his plea for relief upon Rule 60(b)(6). The Court of Appeals affirmed the district court's denial of Mr. Allen's motion for the same reason it denied Mr. Ruben's motion.

> It is apparent from the fact that Allen relies upon the same evidence and the same arguments that Ruben relies upon that Allen's Rule 60(b)(6) motion is merely an attempt to circumvent the time limitations under Rule 60(b)(1). A litigant may not move for relief under Rule 60(b)(6) in order to circumvent the applicable time limits on motions under subsections of Rule 60(b).

Accordingly, the petitions of Mr. Ruben and Mr. Allen relying upon the requirements of Rule 60(b) should be denied.

ARGUMENT

I. THE DISTRICT COURT HAD PERSONAL JURISDICTION OVER THE DEFENDANTS AND THUS THE JUDGMENT ENTERED AGAINST THEM WAS VALID; AND THE COURT OF APPEALS ACTED APPROPRIATELY AFFIRMING THE DISTRICT COURT REFUSAL TO VACATE THE DEFAULT JUDGMENT PURSUANT TO RULE 60(b)(4).

A. Defendants' counsel was authorized to accept service of process.

In relevant part, the Consent Order provided that Defendants' counsel, Mr. Harper, "would accept service of process on behalf of the above-named Defendants [IYG and Messrs. Ruben, Allen, Moore and Edwards] for legal proceedings instituted by the Plaintiff, provided that, such proceedings are commenced by the Plaintiff no later than 180 days from the date of this Order." (App., p. 39). As previously discussed, *supra*, the second lawsuit as plainly evidenced and anticipated in the parties' agreement was properly commenced within 180 days from the effective date of the Consent Order.

When the first lawsuit was filed, Mr. Harper was approached by Mr. Allen concerning representation of all the Defendants. Mr. Harper agreed to represent all the Defendants; and Mr. Allen apparently was appointed by the Defendants as the "contact" between Mr. Harper and

the other Defendants. (App., pp. 28, 29, 102). Accordingly, for Mr. Ruben to claim he was never represented by Mr. Harper plainly does not square with the record.

In the November 3, 1987, letter, Mr. Harper advised Mr. Allen that the initial lawsuit against all Defendants had been dismissed, but the Plaintiff had the right to reinstitute suit. (App. pp. 37, 38). Mr. Harper testified that a copy of the Consent Order was enclosed with the November 3, 1987, letter; and the letter does bear the notation "Enclosure." (App., pp. 37, 38). In his Affidavit of September 26, 1990, Mr. Allen stated that after receiving the November 3, 1987, letter, he "had a telephone conversation with Mr. Ruben and told him the contents of the letter." (App., p. 125). The copy of the proposed Consent Order, apparently enclosed with the November 3, 1987, letter and discussed by Mr. Allen and Mr. Ruben, should have given them ample notice and opportunity to protest any objectionable terms of the Consent Order.

The attorney and client relationship is one of principal and agent; and general agency rules are applicable to the relationship. *Ampex Credit Corp. v. Bateman,* 554 F.2d 750 (5th Cir. 1977). Thus, the omissions and commissions of an attorney are to be regarded as the acts of the client he or she represents. *Davis v. United Fruit Co.,* 402 F.2d 328 (2d Cir. 1968), *cert. denied,* 393 U.S. 1085 (1989). The client as principal is bound by the acts of his or her attorney agent acting within the scope of his or her actual, apparent or ostensible authority. *Prate v. Freedman,* 583 F.2d 42 (2d Cir. 1978). This rule applies with particular force where third parties have justifiably relied on the attorney's ostensible authority, *e.g., Phelps v. Kozakar,* 146 Cal. App. 3d 1078, 194 Cal. Rptr. 872 (Cal. Ct. App. 1983),

and springs from the concept that a client freely chooses his or her attorney and retains the right of dismissal throughout the relationship. *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962).

The Consent Order specifically authorized service of the reinstituted lawsuit upon Mr. Harper. (App., p. 40). Service was accomplished by the Plaintiff in that fashion and in reliance upon the authority shown in the Consent Order. (App., p. 58). Mr. Harper answered and counterclaimed; and he also filed a motion to dismiss. (App., p. 4). Under similar circumstances, other courts have found acceptance of process by an attorney to be valid service on his or her client. *E.g., United States v. Bosurgi*, 343 F. Supp. 815 (S.D. N.Y. 1972); *Smith v. Spitzenberger*, 363 N.W.2d 470 (Minn. Ct. App. 1985); *Friedman v. Friedman*, 224 So. 2d 424 (Fla. Dist. Ct. App. 1969).

Mr. Ruben and Mr. Allen attempt to focus attention upon appropriateness of service upon them by publication of the Rule to Show Cause. Judge Hawkins stated: "In our attempts to serve Mr. Ruben and Mr. Allen with return receipts requested, they all returned back to the sender." (App., p. 82). Plaintiff's counsel noted: "In *addition* to the Court's attempt to give each Defendant notice, I *also* had published in the local newspaper in the same county as its business and the last address for the Defendants a notice." *Id.* (emphasis supplied). Under these circumstances, service by publication in a newspaper of general circulation in Broward County Florida, the last known address of each of the Defendants, was merely an additional method employed in the numerous attempts to reach the Defendants. In short, the facts reveal no infirmity in service upon Mr. Ruben and Mr. Allen.

Mr. Harper was authorized to accept service of the reinstituted lawsuit; and the Plaintiff was entitled to rely upon that apparent authority. When it became apparent the Defendants were being uncooperative with their attorney, the district court and Home Port's counsel exerted extra effort to notify Mr. Ruben and Mr. Allen of pending proceedings. Mr. Ruben and Mr. Allen claim no notice; the record speaks otherwise. The default judgment entered against Mr. Ruben and Mr. Allen was appropriate; and the district court and appellate court rulings were proper.

B. The lawsuit was reinstituted in a timely fashion.

Judge Hawkins signed a Consent Order on November 4, 1987; it was filed on November 13, 1987, and subsequently entered on November 17, 1987. (App., pp. 14, 25, 26). Home Port reinstituted its lawsuit on May 4, 1988; and personal service on the Defendants' counsel of record was accomplished on that date. (App., p. 58). The lawsuit was filed within the 180 day period provided for in the parties' Consent Order. (App., pp. 10-12).

Rule 58 provides in pertinent part that a "judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Entry occurs "only when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum and when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action in the district court." *Ferrell v. Beatrice Pocahontas Co.*, 585 F.2d 683, 688 (4th Cir. 1978);

Fed. R. Civ. P. 58, 79(a). If there is doubt as to the operative date of a judgment, that doubt is to be resolved in favor of the longer period of time. *Phan v. Friedes*, 91 F.R.D. 408 (N.D.Ill.1981).

It is significant that Mr. Harper never made any representation to the court that the pleadings were not timely filed in accordance with the parties' agreement and Consent Order. In addition, the timeliness of the reinstituted lawsuit was never raised in the Defendants' responsive pleadings or during the August 25, 1988, hearing when Mr. Harper was seeking to be removed as Defendants' counsel. (App., pp. 65-78). By not challenging the timeliness of the refiled suit in those pleadings, the Defendants waived their rights to do so at a later date. Fed.R.Civ.P. 12(b)(6).

C. There was no violation of rights of Mr. Ruben and Mr. Allen to procedural due process.

Home Port does not seek to diminish in any way the procedural due process protections afforded Mr. Ruben and Mr. Allen. Home Port's position supports Judge Hawkin's numerous rulings that Mr. Ruben and Mr. Allen received adequate notification of the proceedings and either carelessly or in a calculated "hide and go seek" manner did not care to communicate with their lawyer or appear at the appropriate times for discovery, trial dates, or hearings. Perfect notice is not what the law requires. Rather, where non-personal service is employed, the question is whether the method employed is reasonably calculated to give notice to the party whose interests are to be affected by the suit or proceedings and to afford

him or her an adequate opportunity to be heard. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). The practicalities in a given case are a factor in determining whether the constitutional requirements have been satisfied. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

Home Port served the second lawsuit upon the counsel of Mr. Ruben and Mr. Allen pursuant to the terms of the Consent Order. Such service was reasonably calculated to give them notice of the action. Service of Process in accordance with the parties' agreement upon the actual or apparent agent of Mr. Ruben and Mr. Allen should not be deemed defective, for to do so would rob consent orders of their certainty and afford defaulting Defendants to cast blame upon their attorney in defense of an unwanted outcome or as a result of being found. Consent orders would have little or no value if the terms upon which the parties had agreed could not be trusted.

After receiving the second pleadings, Mr. Harper forwarded them to the Defendants by registered mail at the address given to him. (App., p. 68). The pleadings were returned to Mr. Harper with a notation the Defendants were no longer at the address provided to him and their whereabouts were unknown. *Id.* Mr. Harper sent the pleadings to Adventurent, IYG's successor corporation in which Mr. Ruben and Mr. Allen were principal stockholders. (App., pp. 68-69). In addition, Mr. Harper's secretary attempted to contact Mr. Ruben and Mr. Allen at their former business address in Florida, which was then being operated by Adventurent. However, the persons she spoke with were "generally uncooperative" and would not assist her in locating Mr. Harper's clients. (App., pp. 4, 29).

Although Mr. Allen was the person in charge of the litigation for the defendants, he either was careless or deceptive in not giving his new Texas address to Mr. Harper. *Id.* After Mr. Allen moved to Texas in March 1987, Jan Gibson, an employee of both IYG and Adventurent, supposedly forwarded all business mail to Mr. Allen in Texas. (App., pp. 28, 29). Moreover, the same forwarding policy allegedly applied to Mr. Ruben as well. *Id.* Mr. Allen and Mr. Ruben were stockholders of Adventurent. It strains credulity, given Ms. Gibson's familiarity with the whereabouts of Mr. Allen and Mr. Ruben, to believe that they were not made aware of all correspondence from their attorneys or federal court, particularly registered mail. Significantly, Mr. Harper's November 3, 1987, letter did reach Mr. Allen; and he discussed its contents with Mr. Ruben. (App., p. 125). Despite actual knowledge that the lawsuit could be reinstituted, Mr. Allen and Mr. Ruben both moved to new addresses and failed to advise Mr. Harper of the relocation. As the district court noted in its Order affirmed by the appellate court, this defies common sense. It also suggest "ulterior motives." (App., p. 136).

It has long been held that with respect to any type of substituted service, it need only be "reasonably probable that the party whose property is placed in jeopardy will be apprised of the pendency of the action and will be afforded a reasonable opportunity to appear therein and make his defenses." *Jacobs v. Roberts*, 223 U.S. 261, 265-266 (1912). The Petitioners partially cite *Nations v. Johnson*, 65 U.S. 195 (24 How.) (1860). The correct and complete citation from *Nations*, however, supports the Appellee's position rather than that of the Appellants:

> Notice to the defendant *actual or constructive,* however, is essential to the jurisdiction of all courts, and it was held by this court, in *Webster v. Reid,* II How. 460, that when a judgment is brought collaterally before the court as evidence, it may be shown to be void on its face by want of notice to the person against whom it is entered. Numerous cases . . . assert the general rule that no man shall be condemned in his person or property without notice and an *opportunity* to make his defense.

Nations v. Johnson, 65 U.S. at 203. (emphasis supplied). The Supreme Court in *Nations* clearly countenanced constructive notice and recognized that it may be the only practicable notice. *Id.*

Home Port reinstituted its lawsuit against the Defendants within 180 days of the effective date of the Consent Order. Home Port had a right to rely upon the terms of the Consent Order in serving the reinstituted suit on Defendants' counsel and expect Defendants' counsel to accept service pursuant to the parties' agreement and Consent Order. The responsive pleadings did not raise any issue of defective service. Mr. Ruben and Mr. Allen were appropriately before the district court; the district court properly exercised personal jurisdiction upon them; and the appellate court appropriately affirmed the trial court rulings.

II. THE DISTRICT COURT APPROPRIATELY EXERCISED ITS DISCRETION IN REFUSING TO VACATE THE DEFAULT JUDGMENT PURSUANT TO EITHER RULE 60(b)(1) OR 60(b)(6); AND THE COURT OF APPEALS ACTED APPROPRIATELY AFFIRMING THE DISTRICT COURT.

A. There was no "excusable neglect" or "any other reason justifying relief" on the part of Mr. Ruben and Mr. Allen or their counsel.

While Rule 60(b) may be "a grant reservoir of equitable power to do justice in a particular case," *Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396, 402 (5th Cir. 1981), the present matter is not such a case. The present situation is similar to *Coleman v. Frierson,* 607 F. Supp. 1566 (N.D. Ill. 1985), *aff'd in part and rev'd in part on other grounds,* 814 F.2d 1142 (7th Cir. 1987). In *Coleman,* the court found the movants were not entitled to relief under Rule 60(b)(6) where the defendants were not diligent and conscientious clients and had not been misled about the status of the litigation, although counsel might have been more diligent in communicating with them. *See also C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.,* 726 F.2d 1202 (7th Cir. 1984) (whether alleged ground for relief is interpreted to be clause (1) or (6), district court did not abuse its discretion in refusing to vacate default judgment where, *inter alia,* there was nothing in record to indicate that they could not have spoken to their attorney more frequently had they wished to and any lack of cooperation could have been cured in this manner); *Gambocz v. Ellmyer,* 438 F.2d 915 (3d Cir. 1971); *Veechione v. Wohlgemuth,* 426 F. Supp. 1297 (E.D. Pa.), *aff'd,* 558 F.2d 150 (3d Cir.), *cert. denied,* 434 U.S. 943 (1977) (consent

decree will not be vacated under clause (6) on ground counsel not authorized to enter into it where defendant had fair chance to evaluate terms and was his responsibility to assure that proper authorization had issued); *R.C. Service, Inc. v. Kende Leasing Corp.*, 111 F.R.D. 428 (N.D. Ill. 1986) (even where failure to comply with court's discovery orders had been due to gross negligence of defendant's attorney, default judgment would not be set aside where defendant could not show he had been a conscientious client).

Mr. Harper attempted with diligence to notify the Defendants that the lawsuit had been reinstituted. Certified mail to the last known address of Mr. Ruben and Mr. Allen was returned. (App., p. 68). Telephone calls to Adventurent were unavailing. (App., pp. 4, 29). The Defendants' uncooperative behavior during the second phase of the litigation was consistent with their conduct during the pendency of the first action. The Plaintiff's counsel noted Mr. Harper's troubles with the recalcitrant Defendants with respect to the initial trial date as follows:

> The reason why the action was not brought to trial in November of last year, and I can understand Mike's [Harper] problems, he was having difficulty getting his clients here to participate in the trial.

(App., p. 70).

By May 13, 1989, Mr. Ruben had formally retained Mr. Chastain. *Id.* Mr. Chastain did not move to set aside the default until March 13, 1990. Given Mr. Ruben's awareness of the facts and circumstances giving rise to

the default judgment in the first place, one should reasonably expect greater diligence on his part. Moreover, the facts do not show "excusable" neglect by Mr. Ruben and Mr. Allen or their counsel. Under the circumstances of this case, Mr. Harper did all he could do to represent his evasive clients.

Almost four (4) years have now passed since Home Port attained its default judgment; and allowing these particular Defendants to further stretch finality of the judgment would not advance fairness, realism, and reasonableness in the application of Rule 60(b).

B. The errors or omissions of Defendants' counsel are not "any other reason justifying relief from" the default judgment pursuant to Fed.R.Civ.P. 60(b)(6).

The case law is clear that, in deciding whether a party has satisfied the standards of Rule 60(b)(6), a court may not consider mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud: the reasons justifying relief under clauses (1), (2) and (3) of the Rule. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988). Clause (6) does not provide a discretionary foundation from which to seek relief outside the one (1) year time limit imposed on clauses (1) through (3). *Ackerman v. United States*, 340 U.S. 193 (1950). Rule 60(b)(6) is confined to those situations where a party is confronted with "extraordinary circumstances" excusing failure to follow ordinary paths of appeal. *Klapprott v. United States*, 335 U.S. 601 (1949).

Rule 60(b)(6) should come into play only if the one (1) year time limitation has expired and the facts are so "extraordinary" as to bring them within the meaning of "any other reason justifying relief" not covered in clauses (1) through (5). Since Mr. Ruben filed his Rule 60(b) motion within one (1) year of entry of the default judgment, potential relief would be available only under Rule 60(b)(1). Conversely, because Mr. Allen filed his motion to vacate nearly eighteen (18) months after entry of the default judgment, his avenue of relief solely rests upon Rule 60(b)(6). Mr. Allen's Rule 60(b)(6) motion is a transparent attempt to circumvent the one (1) Year time limit prescribed by Rule 60(b)(1) which should be scrupulously observed. Rule 60(b)(6) only authorizes relief from entry of a judgment for any reason justifying relief *other* than those reasons set forth in the preceding five (5) clauses. *Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894 (4th Cir. 1987).

C. The errors or omissions of Defendants' counsel are properly imputed to the Defendants.

The omissions and commissions of an attorney are to be regarded as the acts of the client he or she represents. If a third party has relied on those acts, particular injustice would be done to our judicial system if a client were allowed to repudiate an attorney-client relationship merely because the attorney has engaged in behavior that may have been detrimental to the client's interests. *Link v. Wabash R.R. Co.*, 370 U.S. at 633-634. The client may well have a valid grievance; however, the target of his or her

ire should not be the innocent third party, but rather his or her own attorney. *Id.*

Mr. Allen retained Mr. Harper on behalf of all the Defendants; and he agreed, with the other Defendants' apparent consent, to act with authority as their spokesman. (App., pp. 28, 29, 102). Indeed, Mr. Allen admitted transmitting information he received from Mr. Harper to Mr. Ruben. (App., p. 125). Mr. Ruben was aware of the fact Mr. Harper was representing him in the litigation. Mr. Ruben subsequently moved to California, but did not inform Mr. Harper of that fact.

Although it serves Mr. Ruben's present objective to swear blame solely should be pinned to Mr. Harper and Mr. Chastain, in his earlier opportunity through affidavit to explain apparently dilatory conduct and plainly unreasonable delays harming his rights, he did not utter one (1) peep of Mr. Chastain's gross inattentiveness as causing his problem until September 27, 1990. (App. pp. 136, 137). No complaints against Mr. Chastain from Mr. Ruben on March 14, 1990, or July 9, 1990. (App., pp. 108, 110).

Mr. Ruben's concern with his attorneys' competence surfaces apparently whenever he does not get what he wants in Court. The timing is suspect. Mr. Ruben and Mr. Allen should not now be allowed to claim that they bear no fault for what they perceive to be their attorneys' incompetence, negligence, or unethical behavior. *Douglas v. Kemp*, 721 F. Supp. 358 (D.D.C. 1989), *aff'd*, 906 F.2d 783 (D.C. Cir. 1990). Innocent third parties should not suffer for shortcomings of another party's attorney.

D. The Plaintiff will suffer unfair prejudice if the default judgment is vacated.

This suit was first filed in 1986, but was dismissed upon agreement of the parties. The lawsuit was reinstituted on May 4, 1988, in compliance with the terms of the Consent Order. Approximately six (6) years have passed since litigation began; and more than four (4) years have lapsed since this action was brought the second time. The district court's concern with "dulled memories" is valid. (App., pp. 23-25). In his affidavit of February 3, 1991, Mr. McEachern stated that Edward Willcox, III, former controller of Home Port, is no longer available. Mr. Willcox maintained all of Home Port's financial records and had numerous conversations with the Defendants during his employment with Home Port. Not only is Mr. Willcox no longer available, but the financial records and documents that were under his dominion are now also unavailable. (App., pp. 23-25, 140-142). If this default judgment is vacated, Home Port will be forced to litigate the matter without a key witness and absent crucial documents.

Given the circumstances of this case, even if relief were available under Rule 60(b)(6), the motions were not made within the "reasonable time" contemplated by the Rule. In *Park v. Lexington Ins. Co.*, 812 F.2d at 877, and *United States v. Moradi*, 673 F.2d 725, 728 (4th Cir. 1982), it is held that a movant under Rule 60(b) must act not only in a timely fashion but also must demonstrate a lack of prejudice to the non-movant. Although he knew of the alleged problems with the judgment within a matter of days of its entry, Mr. Ruben waited nearly one (1) year to

file his Rule 60(b) motion. On the other hand, because Mr. Allen waited more than one (1) year, he must rely upon Rule 60(b)(6), while the motion is more appropriately based on clause (1). In *Augusta Fiberglass*, the defendant filed his Rule 60(b) within two (2) weeks of entry of the judgment; and the prejudice to Home Port here is far greater than the loss of a "quick victory." *Id.* The Petitioners' citation of *Augusta* is inapposite and buttresses Home Port's position that unreasonable delay, inexcusable neglect, bad faith, and harsh prejudice hoisted upon the Plaintiff render Rule 60(b) no refuge for these particular Defendants.

CONCLUSION

Home Port would respectfully request that the Petitions attacking the rulings of the district court, affirmed by the appellate court refusing to vacate the default judgment, be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-1892

In The

Supreme Court of the United States

October Term, 1992

PETER RUBEN,

Petitioner,

v.

HOME PORT RENTALS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the finding by the District Court that it had personal jurisdiction of Peter Ruben thereby denying him due process of law?

2. Did the Court of Appeals err in affirming the refusal of the District Court to vacate the default judgment under Rule 60(b) Fed.R.Civ.P. entered against Peter Ruben and in not finding that its failure to do so was an abuse of discretion?

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ARGUMENT

QUESTION 1: BECAUSE THE DISTRICT COURT DID NOT HAVE PERSONAL JURISDICTION OF PETER RUBEN, THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST HIM.

A. Purported service on Harper was not service on Ruben because Harper had not been authorized nor designated by Ruben as his agent for service of process.

In its brief Home Port asserts that "common sense and logic dictate the conclusion" that Ruben and Allen authorized Harper as their agent for service of process on them. (Respondent's Brief p. 8) Ruben did not sign the Consent Order or any Order or statement or document or power of attorney wherein Harper became his agent, nor has he ever acknowledged Harper as his agent for service of process. The fact that Harper signed the Consent Order prepared by counsel for Home Port wherein Harper was designated as the agent for service of process on the defendants, provided the process is served within 180 days of the date of the Order, is the sole premise upon which Home Port's contention rests. Under this contention, the declarations of the agent establish agency. This is not the law. It would be a frightening prospect if a self-professing agent could establish agency without the knowledge or awareness of the purported principal.

> The law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency. *Clippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163, 165 (S.C.App. 1990); *Fuller v. Eastern Fire & Casualty*

Insurance Company, 240 S.C. 75, 124 S.E.2d 602 (1962); *City of Greenville v. Washington American League Baseball Clubs,* 205 S.C. 495, 32 S.E.2d 777 (1945).

There was nothing in the file of Harper reflecting any exchange wherein Harper was designated as agent for service of process for Allen or Ruben. There is no evidence from Harper that he was so designated by Allen or Ruben. The *only* evidence on this point are the Affidavits of Ruben and Allen. They are unequivocal in stating that no such agency existed. (App. pp. A-103; A-126; A-135) No Affidavit from Harper or anyone else challenges these facts.

A power of attorney issued by a surety company to an agent of a bonding company to bind it on criminal recognizance bonds, did not make the bonding company agent the agent of the surety company for purposes of service of process upon the surety company in an action on the bonds. *Anderson County v. Indiana Lumbermens Mutual Insurance Company,* 404 S.C. 363, 404 S.E.2d 718 (S.C.App. 1991). The same is true of an attorney employed to defend a civil action. There is no implied authority for him to accept service of process in a new action against the client.

Apparently recognizing the absence of any evidentiary support for its contention that Harper was authorized as agent for service of process by Ruben or Allen, Home Port alleges in its brief (Respondent's Brief. p. 10) that "Harper had discussed the specific terms of the Consent Order with Mr. Allen." That did not occur. The only evidence on it is from Allen that no such discussion occurred. (App. p. A-126) Home Port alleges in its brief that Harper sent a copy of the Consent Order dated November 4, 1987 to the defendants with Harper's letter

of November 3, 1987 to Allen because that letter reflects that there was an enclosure to it. (Respondent's Brief p. 7, p. 10, p. 22, p. 23 and p. 35) This is more than misleading. The Harper letter of November 3, 1987 to Allen does not enclose an Order. It says: (App. p. A-37)

> Also enclosed please find our bill for services rendered in the matter.

The enclosure was Harper's bill. Home Port converts this obvious fact into an untruth by asserting that the enclosure to this letter was a copy of the Consent Order. The letter of November 3, 1987 was *before* the Order of November 4, 1987 had been signed. There is no mention in this letter of any consent Order or the terms of any dismissal other than that a suit could be brought again. The source of the mis-information upon which Home Port relies for its accusation that a copy of the Consent Order was sent to Allen has roots in the memorandum of Harper and his statement to the Court in connection with his motion to be relieved as counsel. In Harper's August 1, 1988 memorandum in support of his motion to withdraw his appearance on behalf of the defendants, is the following: (App. p. A-63)

> 1. That, pursuant to Consent Order *filed November 4, 1987.* F. Mikell Harper agreed to accept service for the Defendants, and Defendants were fully aware of said Consent Order and the fact that a new proceeding was being instituted in said Court.[1] (Emphasis added.)

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[1] Harper corrected this misstatement at the hearing on August 25, 1988 (App. p. A-77) and in his Affidavit of January 16, 1991 (App. pp. A-138 – A-139)

At the hearing on Harper's motion to withdraw his appearance, on August 25, 1988, in the recitation of his activity in the matter, Harper stated to the Court (App. p. A-67):

> I mailed those pleadings or that Order, that Consent Order to Mr. Allen, and together *with a letter* explaining to him that this matter was ended. They did have leave to bring it again within 180 days.
>
> I considered that my representation of him had been completed at that point, and that we were on an even basis, and *that was that.* (Emphasis added.)

The letter referred to by Harper in his statement to the Court was his letter of November 3, 1987 to Allen. (App. p. A-37) That letter did not contain a copy of the Consent Order.

It is significant to note that the same paragraph of Harper's memorandum of August 1, 1988, quoted above (App. p. A-63), upon which Home Port relies for its allegation that Harper sent a copy of the Consent Order to Allen also reflects that Harper's understanding of the effective date of the Consent Order of November 4, 1987 was that it was "filed November 4, 1987." Home Port seeks to ignore that obvious fact.

It is to be remembered that in connection with his motion to withdraw as counsel for the defendants, Harper was acting on behalf of Harper and not on behalf of the defendants. In that role he was, in effect, an adversary. His statements were to serve the interests of Harper, not those of Ruben. Although Harper's memorandum of August 1, 1988 States that the defendants were aware of the fact that a new proceeding was being instituted, he

recanted that statement at the hearing on August 25, 1988 (App. p. A-77) and in his Affidavit of January 16, 1991 (App. p. A-139). Home Port asserts in its brief that "Harper testified that a copy of the Consent Order was enclosed with the November 3, 1987 letter." (Respondent's Brief p. 22) Harper did not "testify." Harper was not under oath. Perjury was not a risk. Harper made a statement to the Court and submitted a memorandum, discussed above, both of which contained untrue statements. The statement of counsel, particularly in a self-serving role, is not evidence.

> If counsel possibly made oral statements to the judge, factual in nature, which served as a basis for his ruling, we can only say that argument of counsel is not a substitute for evidence. *Brown v. Johnson*, 276 S.C. 68, 275 S.E.2d 876, 878 (1981); *Lloyd v. Walters*, 276 S.C. 223, 277 S.E.2d 888, 889 (1981) (Affirmation by cross examining attorney may not be considered as evidence.)

The only *evidence* is in the Affidavits of Ruben and Allen that Harper was not designated as their agent for service of process. (App. pp. A-103; A-126; A-135) The only *evidence* as to non-receipt by Allen of a copy of the Consent Order of November 4, 1987 is the Affidavit of Allen. (App. p. A-126) There was no communication at any time between Ruben and Harper. (App. pp. A-104; A-116; A-139) There is no *evidentiary* challenge to these facts by Home Port. Home Port has created facts from concatenated inferences which are without evidentiary support in an effort to obscure the facts.

At the time of the hearing of his motion to be relieved as counsel on August 25, 1988, Harper stated: (App. p. A-67)

> I consider that my representation of him [Allen] had been completed at that point [Harper's letter of November 3, 1987] and that we were on an even basis, and *that was that.* (Emphasis added.)

If that was the understanding of Harper at the time he wrote his November 3, 1987 letter to Allen, how could Allen and Ruben have a different understanding as to what might later occur? They could not. "That was that." It was over. Harper said, "This matter was ended." (App. p. A-67)

In his Affidavit of January 16, 1991 (App. pp. A-138 – A-139), Harper did not challenge nor controvert the facts in the Affidavits of Allen and Ruben although Harper's Affidavit is three and one-half months later.

The significance of the absence of notice to Ruben cannot be over emphasized. Without notice there cannot be due process. All that occurred thereafter in connection with the 1988 lawsuit did not give notice to Ruben until he received the default judgment in April 1989. The Affidavits of Ruben, Allen and Harper confirm that Ruben and Allen did not receive a copy of the 1988 suit papers nor notice of the suit. (App. pp. A-104; A-111; A-126; A-136).

QUESTION 2: THE REFUSAL OF THE DISTRICT COURT TO VACATE THE DEFAULT JUDGMENT AGAINST PETER RUBEN UNDER RULE 60(b) FED.R.CIV.P. WAS AN ABUSE OF DISCRETION AND THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT.

A. Excusable neglect was clearly established under Rule 60(b)(1) and entitlement to relief under Rule 60(b)(6) Fed.R.Civ.P. was established and the Court of Appeals erred in affirming the District Court's denial of relief.

Home Port devotes much attention to the delay by attorney Chastain in filing a Motion to Vacate the Default Judgment as being attributable to Ruben. In the Order of the District Court, denying the Ruben Motion to Vacate the Judgment dated July 17, 1990 (App. p. A-20), the Court held that Ruben did not act with due diligence (App. p. A-23). However, in the Order of the District Court denying the Ruben motion for reconsideration, dated April 25, 1991 (App. p. A-27), the Court again addressed this point and, based upon the factual showing that the delay was not attributable to Ruben, stated clearly that "the Court does view differently," Ruben's actions following awareness of the default judgment against him. It then cited the controlling law[2] that "when the party is blameless and the attorney is at fault, the former interests control and a default judgment should ordinarily be set aside." (App. p. A-30) In its opinion the

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[2] *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corporation*, 843 F.2d 808, 811 (4th Cir. 1988); *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982).

Court of Appeals noted that the District Court "concluded that Ruben could not be faulted for the delay in his motion." (App. p. A-6) Accordingly, Home Port's treatment of this in its brief has no relevance.

Home Port alleges that denial of relief from the default was justified because: of "uncooperative behavior" and the defendants' "failure to cooperate in discovery matters" (Respondent's Brief p. 2, p. 4, p. 26); of their "dilatory behavior" (Respondent's Brief p. 3, p. 4); Ruben "intentionally evaded contacts from the Court and Mr. Harper" (Respondent's Brief p. 12); and the defendants did not "appear at the appropriate times for discovery, trial dates, or hearings." (Respondent's Brief p. 29)

There is no evidence that there was any discovery that Ruben refused to respond to. There is nothing to indicate any discovery was scheduled. The record establishes without question that every mailing from Harper and the Court after the 1988 action was instituted was returned to the sender. Nothing reached Ruben. Yet he is accused of failing to respond and failing to cooperate in a legal proceeding of which he had no notice. Harper did not mail the 1988 suit papers to Ruben at his address in Florida. Harper did not send the 1988 suit papers to Allen at the address of International at 302 Lewis Lane, Dania, Florida. (App. p. A-34) He sent them to the new address of Adventurent in Ft. Lauderdale, Florida, Suite 106, 5450 NW, 33rd Avenue, Ft. Lauderdale, Florida (App. pp. A-133 – A-134). At the time Harper mailed his May 25, 1988 letter to Allen at the Adventurent address in Ft. Lauderdale, Florida, Harper knew it was not a current address for Allen because in his letter Harper requested that Allen give him his new address and phone number. (App. p. A-60) At the time of Harper's May 25, 1988 letter

to Allen, Ruben was still living at his address of 581 Lake Dasha Boulevard, Plantation, Florida. (App. p. A-105)

Home Port alleges in its brief that Ruben was "evasive," as to service of process. A peculiar aspect of this accusation is that on the very *first* mailing after the default judgment was entered, it reached Ruben, because it was mailed to the old address of International in Dania, Florida and was mis-delivered next door to a person who knew Ruben and who forwarded it to him. Once the judgment was obtained there was no difficultly in locating Ruben. It immediately raises the question of whether the asserted efforts at giving Ruben notice *before* the default judgment were as straightforward as claimed. The statement of Home Port's counsel at the hearing on August 25, 1988 before the District Court is revealing (App. p. A-74):

> Mr. Corbin: I believe it would be more fruitful in trying to find the assets than trying to find the defendants at this point, Your Honor, if we did have a judgment.

Stated otherwise, the remark of counsel was to the effect "give us a judgment and we will then find the defendants." This is exactly what happened. If the same endeavor had been pursued in giving Ruben notice *before* the default judgment as was given after the default judgment he would have received notice. Publishing a Rule to Show Cause in a Florida newspaper to give notice to a California resident cannot qualify as notice under the due process provisions of the constitution.

Relief under Rule 60(b) is:

> " * * * To be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments. * * * Any doubts about whether relief should be granted should

be resolved in favor of setting aside the default. * * * *"

* * *

In short, any considerations of the need "to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments * * * should never be used to thwart the objectives of the blind goddess" of justice itself. *Compton v. Alton Steamship Company,* 608 F.2d 96, 102 (4th Cir. 1979) [citing *Tolson v. Hodge,* 411 F.2d 123, 130 (4th Cir. 1969) and *Boughner v. Secretary of Health Ed. and Welf., U.S.,* 572 F.2d 976, 978 (3rd Cir. 1978).].

CONCLUSION

Peter Ruben was never served with process. For this reason the District Court did not have personal jurisdiction of him. Peter Ruben has been denied notice of the claim against him and an opportunity to be heard. For this reason he has been denied due process of law under the Constitution. The Petition for Certiorari should be granted.

All of which is respectfully submitted.

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